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NO. _____

IN THE

United States Supreme Court

October Term, 1980

MAX FACTOR & CO.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 21, 1981

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I. QUESTIONS PRESENTED

1. AFTER FINDING THAT THE BOARD'S ORDER CONTAINED "NO SUPPORTING ANALYSIS" ON ITS CRITICAL CONCLUSION, SHOULD THE NINTH CIRCUIT HAVE REMANDED THE ORDER TO THE BOARD TO SUPPLY SUCH ANALYSIS?
2. DID THE BOARD IMPROPERLY DEPART FROM ITS OWN DEFERRAL POLICIES HEREIN?
3. SHOULD THIS COURT RESOLVE THE CONFLICT BETWEEN THE CIRCUITS REGARDING THE PROPER SCOPE OF REVIEW OF A BOARD ORDER DECLINING TO DEFER TO AN ARBITRAL AWARD?
4. ARE THE NEW DEFERRAL POLICIES ADVANCED BY THE BOARD AND ACCEPTED BY THE NINTH CIRCUIT HEREIN PREMISED ON AN ERRONEOUS VIEW THAT *ALEXANDER V. DENVER-GRANT* IS APPLICABLE TO CASES UNDER THE NATIONAL LABOR RELATIONS ACT?

List of all parties to the proceeding in the court below whose judgment is sought to be reviewed herein:

Max Factor & Co.
National Labor Relations Board
Ms. Luisa Gratz (Intervenor In Ninth Circuit)

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STATUTORY PROVISIONS

". . . . Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Labor Management Relations Act, Section 203(d) 29 USC Section 173(d).

OPINIONS BELOW

NLRB v Max Factor and Co., 105 LRRM 2765 (9th Cir, September 9, 1980, rehearing denied October 24, 1980)

Max Factor & Co., 239 NLRB No. 99, 100 LRRM 1023 (1978)

JURISDICTION

Petitioner Max Factor & Co. ("petitioner" or the "company") seeks certiorari herein with respect to a decision of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") which was issued on September 9, 1980. Petitioner sought rehearing, which the Ninth Circuit denied by order dated October 24, 1980. Certiorari jurisdiction lies in this Court under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The company manufactures cosmetics in various plants, including one in Los Angeles where the employee whose termination gave rise to this case worked. In 1959, the company first established a bargaining relationship with the International Longshoremen and Warehousemen Union, Local 26 ("union") at the Los Angeles plant. That relationship continues to the present day and has included a series of successive collective bargaining agreements governing labor-management relations at that plant.

The company first hired the employee at issue herein, Ms. Luisa Gratz (the "employee"), in 1968. Between 1972 and 1974 the company terminated the employee three separate times. Each time, she filed a grievance under the collective bargaining agreement and was returned to work. The employee became assistant chief steward in 1972, and chief steward in 1974. In early 1977, after progressively disciplining the employee over a period of several months, first with warnings and then with a suspension, the company terminated her for insubordination, failure to perform a reasonable amount of work, and use of profane and abusive language. Following her 1977 termination, the employee again filed a grievance under the collective bargaining agreement, but this time she

also filed an unfair labor practice charge with the National Labor Relations Board ("Board"). Thereafter, the employee pursued both the grievance and the unfair labor charge and participated fully in hearings before both the Board's Administrative Law Judge ("ALJ") and an arbitrator selected under the collective bargaining agreement.

Both hearings concerned the same event, the employee's suspension and termination. In both, the employee argued that the company's real motive for disciplining her was her protected conduct in pursuing her duties as union steward. While she thus made the same basic argument in both proceedings, she testified in the ALJ hearing that the company had offered her economic rewards to cease performing her union duties, as evidence that the company's real motive for disciplining her was because of her performance of said union duties. Specifically, she testified that management had shortly prior to suspending her offered to pay for her return to law school or alternatively to give her a position in management if she would give up her union position. The employee withheld this purported evidence from her testimony in the subsequent arbitration hearing, however.

The ALJ issued his tentative ruling in November of 1977. He found that the company's motive in suspending and terminating the employee was because of her union activities. He relied heavily on the employee's testimony on the company's purported offer of benefits as evidence of its anti-union animus in disciplining her. The arbitrator issued his own decision two months later, in January of 1978. He held that the company suspended and terminated the employee for conduct that violated various plant rules and the collective bargaining agreement, and that the company did not suspend or terminate her because of protected union activities. The arbitral award did not mention the company's purported offer of benefits, since the employee had withheld that testimony from the arbitrator. The company asked the Board in January 1978 to defer to the arbitral award upholding its discipline of the employee, since it is the Board and not its ALJ that makes the final determination

and which has authority, under its own precedents, to defer to an arbitral award.

Eleven months later, the Board issued its order. In said order, the Board refused to defer to the arbitral award on the grounds that the award did not address the purported offer of economic benefits and that it did not discuss the employee's suspension and termination as statutory issues under the National Labor Relations Act. The company believed that the Board's refusal to defer on these grounds violated the Board's own deferral policies and it refused to comply, requiring the Board to petition the Ninth Circuit for enforcement under 29 U.S.C. Section 160(e). Briefs were filed in the Ninth Circuit by both sides and by the employee as intervenor. On September 9, 1980, the Ninth Circuit, in a 2-1 split decision, decided to enforce the Board's order. A rehearing sought by the company was denied on October 24, 1980. The company, as petitioner, is now before this Court on the instant petition for certiorari because it believes the Board and the Ninth Circuit erred for the reasons set forth below.

ARGUMENT

I.

THE NINTH CIRCUIT VIOLATED A BASIC TENET OF ADMINISTRATIVE LAW BY NOT REMANDING THE ORDER TO THE BOARD

In its opinion in this case, the Ninth Circuit held that the Board refused to defer to the arbitral award under the *Spielberg* doctrine because the Board found the award to be "clearly repugnant" to the purposes and policies of the National Labor Relations Act ("NLRA" or "Act"). 29 U.S.C. § 151 *et seq.*[1] In so holding, the Ninth Circuit specifically found that the Board's conclusion of repugnance "contains no supporting analysis." Notwithstanding this failure by the Board to explain how it had reached that critical conclusion, the Ninth Circuit upheld the Board's order. It did so by analyzing the adminis-

[1] *Spielberg Manufacturing*, 112 NLRB No. 139, 36 LRRM 1152 (1955).

trative record itself and supplying its own analysis upon which "the Board could reasonably conclude" that deferral was repugnant. Ninth Circuit Decision, Appendix, p. A-13. One Judge in the Ninth Circuit dissented and voted to remand, arguing that "*we need to know why the Board thought the arbitration award was repugnant to the Act before we determine whether the Board abused its discretion in refusing to defer to the arbitration award.*" Petitioner submits that the majority Ninth Circuit opinion violated a basic tenet of American administrative law by not requiring the Board to explain the reasoning that led it to its conclusions.[2]

The requirement that an agency state the reasons which led it to its conclusions is a judicially created (and statutorily adopted) instrument of judicial control of administrative action. *See generally,* Byse, of Findings and Reasons in Formal Proceedings in Administrative Law," 26 AMER.J.COMP.L. (1978) 394, 396 [hereinafter cited as "Byse, Requirement of Findings"]. Unless an administrative agency is required to explain its conclusions, a reviewing court can only guess at why the agency reached said conclusions, and guessing is not a substitute for judicial review of agency action.

The requirement that an administrative agency explain its reasoning is fully compatible with the deferential standard of review of administrative agencies enunciated in decisions such as *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951), as this Court's opinion in *Burlington Truck Lines Inc. v. U.S.* indicates:

> "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate the administrative

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[2] The Ninth Circuit decision states that based on the ALJ findings and conclusions, which the Board adopted, the Board could reasonably conclude that deferral was repugnant, but the Ninth Circuit decision also states that the ALJ did not even consider the arbitration issue, so the Board could not have adopted any reasoning from the ALJ to support its conclusion that deferral to the arbitral award was repugnant. Ninth Circuit Decision, Appendix, p. A-7 & 12.

> process, for the purpose of the rule is to avoid "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." 371 U.S. 156, 169 (1962).

As Professor Byse points out, considerations of judicial efficiency require that an agency be made to explain its reasoning. Otherwise, reviewing courts will have to study the entire administrative record, rather than merely examining an agency's conclusion and the evidence offered to support or oppose it to determine if it is based on substantial evidence. Byse, "Requirement of Findings," *supra* at 397, 398.

It is also important to require an agency to explain its reasoning so that the aggrieved party will know why the agency acted as it did. That knowledge will allow the aggrieved party an opportunity to decide whether to seek or forego review, and to determine what points to raise if review is sought. Without knowing why the agency acted, the aggrieved party, like the reviewing court, can only guess at the agency's reasoning and may, as a result, be denied any effective judicial review.

Another important reason for requiring an agency to explain its reasoning is to enable the reviewing court to determine if the agency's conclusions are in accordance with applicable law. For the Board to conclude that deferral was repugnant, without explaining why it was repugnant, as the Ninth Circuit specifically found to be the case here, made it logically impossible for the Ninth Circuit to determine if the Board's conclusion was consistent with national labor law. In *Schaffer Transportation Co. v. United States,* 355 U.S. 83 (1957), this Court determined that an agency had misapplied the law relating to national transportation policy and remanded the case to the agency for further consideration. The Court was able thus to determine that the agency had misapplied applicable law only because the agency had explained the reasoning which led it to its conclusion. In this regard, the Court said:

> "To see whether these policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would

> overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress." 355 U.S. at 88.

An arguably correct decision, when the underlying reasoning is clearly stated, may be shown to be incorrect. As Professor Byse points out, the *Schaffer* case is important "because it illustrates how when reasons are required to be given (rather than kindly assumed to exist), a flaw may show up that would otherwise remain undetected. When the agency indicates in its findings what it did consider and pass upon, it also perforce reveals what it failed to pass upon—through a misconception of its statutory duty (i.e. statutory interpretation) or through sheer oversight." Byse, "Requirement of Findings," *supra* at 404.

In the instant case, after finding that the Board had failed to explain how it reached its critical conclusion of repugnance, the Ninth Circuit erred by conducting its own review of the record and supplying the analysis upon which the Board *could have* reached said conclusions, rather than requiring the Board itself to state the reasoning upon which it *did* reach that conclusion. In *Securities and Exchange Commission v. Chenery Corporation,* 318 U.S. 80 (1943), this Court held that the validity of an agency decision must be determined on the reasoning actually used by the agency, not upon the basis of reasoning which the agency might have used:

> "[T]he Commission's order cannot be upheld. Its actions must be measured by what the Commission did, not by what it might have done. . . . The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interest protected by the Act. There must be such a responsible finding." 318 U.S. at 93-94.

Two recent opinions of United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") remanded Board orders because of the Board's failure to explain adequately how it had reached its conclusions. In *Plumbers & Steamfitters Local 342, etc. v. NLRB*, 598 F.2d 216 (D.C.Cir. 1979), the D.C. Circuit found that a Board's order turned on "the resolution of a question of fact, a task entrusted by the Act to the ALJ in the first instance, and ultimately to the Board, subject to our limited review." 598 F.2d at 221. Because the Board had failed to explain how it had resolved that underlying question of fact, the D.C. Circuit remanded the order to the Board to supply the missing analysis, rather than resolving the issue itself, as the Ninth Circuit has done in the instant case.

In *District 1199e, Nat. U. of Hospital and Health Care Employees v. NLRB*, 613 F.2d 1102 (1979), the D.C. Circuit remanded an order to the Board because the Board had failed to indicate that it had sufficiently considered an arbitral award that decided that certain conduct violated the collective bargaining agreement. The court stated:

> "We could, of course, attempt ourselves to resolve the questions by reading between the lines of what the ALJ and the Board have written. But we owe to the Board a deference to its expertise which parallels that owed by the Board to the special values of arbitration. We conclude, therefore, that, whatever the final result, the Board should explicity discuss the implications of the collective bargaining agreement as interpreted by the Arbitrator, both because adequate review of the Board's decision cannot be completed without a full explanation of its reasoning and because the respect due the arbital process requires as much." 613 F.2d at 1109.

Accord, NLRB v. Wilson Freight Co., 604 F.2d 712 (1st Cir. 1979) (Board failed to sufficiently consider arbitrator's findings).

The Board's order in the Max Factor case demonstrates a similar failure. The Board's order here failed to show that the Board had sufficiently considered the existing arbitral award in

reaching its conclusions. The arbitral award had analyzed the evidence presented to the arbitrator by the company and the employee and concluded that the company's progressive discipline of the employee was appropriate under the agreement; that her conduct was not protected under the Act; and that there was "just cause" for her suspension and termination. Arbitral Award, Appendix, p. A-24 et seq. The Board refused to defer to that award. The Ninth Circuit, in reviewing the Board's refusal, found that the Board's critical conclusion contained "no supporting analysis" showing why the arbitral award was repugnant. Instead of requiring the Board to articulate why it found the award repugnant, and thereby requiring the Board to show that it had sufficiently considered that award, the Ninth Circuit supplied its own supporting analysis to bolster the critical conclusion of the Board's order. The majority in the Ninth Circuit decision admits that: "A fuller statement by the Board of its reasons for this conclusion would, as Judge Pregerson states, have been helpful." Nonetheless, the majority holds that: "[W]e cannot say, however, that its refusal to defer on the ground of repugnance to the Act was, *on the record before the ALJ,* an abuse of discretion." Ninth Circuit Decision, Appendix, p. A-14 (emphasis added).

Where the Ninth Circuit erred was in determining "*on the record before the ALJ*" that the Board *could have found* the arbitral award repugnant. Rather, the Ninth Circuit should have determined from the *face of the order itself* if the Board had adequately explained why it *did* find the award repugnant. If the Board failed to supply the underlying analysis, as the Ninth Circuit specifically found, the Ninth Circuit should have remanded the order to the Board for such an explanation. That is precisely the course suggested by Judge Pregerson in his dissent. To proceed as the Ninth Circuit majority did in this case precludes effective judicial review, usurps the function of the administrative agency and denies petitioner an opportunity to ascertain the basis of the agency's action so that it could obtain meaningful judicial review. The Ninth Circuit decision violated a basic tenet of American administrative law by not

requiring the Board to explain its reasoning and should, for that reason, be reversed.

II.

THE BOARD IMPROPERLY DEPARTED FROM ITS OWN DEFERRAL POLICIES IN ITS ORDER HEREIN

In its instant order in *Max Factor,* the Board erred both procedurally and substantively in departing from its own policies on deferral to arbitral awards. Procedurally, it erred in not sufficiently articulating the reasons for its departure and in not employing rulemaking to effect said departure. Substantively, it erred in going from a "clearly repugnant" to a "merely erroneous" deferral policy, in that the prior policy was in accordance with the Act while the new one is not.

Failure To Explain Departure From Its Own Well-Established Deferral Policies

The Board issued its order on December 13, 1978, refusing to defer to the arbitral award of January 1978. The Board's reasoning in concluding that deferral was repugnant is stated in its order, as follows:

> "[T]he Charging Party and the General Counsel contend that deferral to the arbitration award herein would engender a result repugnant to the purposes and policies of the Act. We agree. *The arbitrator did not pass on the unfair labor practice aspects of the Charging Party's suspension and discharge herein, nor did he specifically consider the additional unfair labor practice allegations which the Administrative Law Judge found went to the heart of the Act and were closely interwoven with Respondent's warning, suspending, and discharging the Charging Party.* We conclude therefore that deferral to the arbitration award herein would not effectuate our protection of Section

7 rights, . . ." Board's Order, Appendix, p. A-2 (emphasis added).[3]

It is clear from the above-quoted portion of the Board's order that the Board found the award repugnant because it did not explicitly show that the arbitrator had considered the statutory (i.e., unfair labor practice) issues and because it did not show that he had considered certain additional evidentiary allegations (i.e., the purported offer of economic benefits). In a footnote to the above-quoted language from the order, the Board referred to its own *Electronic Reproduction* precedent [213 NLRB No. 99 (1972)], which precedent set forth its existing deferral policies at the time the Max Factor case came before it. Under the Board's existing deferral policy, the arbitral award was not required to address the facts in terms of statutory claims, nor was it required to show that the employee had presented all allegations to the arbitrator that he had presented to the ALJ. In finding the employee's conduct unprotected in his award herein, the arbitrator did not explicitly address the statutory claims nor, of course, did he address other allegations presented only to the Board. Under the existing precedent when his award was issued, neither was required. However, it was precisely because the arbitral award here did not address the statutory issues or the company's purported

[3] As explained above in Section I of the Argument, the Ninth Circuit specifically found that the Board's order "contains no supporting analysis" for its conclusion of repugnance. Since the Ninth Circuit expressly so held, its decision must be evaluated on that basis and, as discussed in Section I, is erroneous on that basis. However, in deciding whether to grant certiorari, this Court also needs to examine for itself what the Board order actually said, as opposed to what the Ninth Circuit held that it said. As indicated in this section of the Argument, the Board did explain its reasons for concluding that the award was "repugnant," and this explanation indicates that the Board acted erroneously. Because the Ninth Circuit mistakenly read the Board's order as not explaining its reasoning (see pages A-10 through A-12 of Decision, and particularly footnote 6 therein), the Ninth Circuit was not confronted with deciding if the stated reasoning was erroneous.

offer of benefits (which had never been presented to the arbitrator) that the Board decided not to defer to it.[4]

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[4] The *Electronic Reproduction* deferral policy was intended to prohibit employees from intentionally withholding evidence from an arbitrator in order to relitigate a reinstatement claim before the Board. *Electronic Reproduction* this principle as follows: "We believe the better application of the underlying principles of *Collyer* and *Spielberg* to be that we should give full effect to arbitration awards dealing with discipline or discharge cases, under *Spielberg*, except when unusual circumstances demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding." 213 NLRB No. 110, at p. 762. The Board's *Electronic Reproduction* deferral policy was particularly critical to its *Max Factor* order because the employee in Max Factor pursued both arbitration and ALJ proceedings, but withheld certain testimony from the arbitrator regarding a purported company offer of economic benefits, which testimony she presented to the ALJ, and upon the basis of which both the ALJ and the Board substantially relied in reaching conclusions contrary to that of the arbitrator. The Ninth Circuit decision addresses the employee's failure to present testimony, which was extensively briefed and argued before it, by stating: "There is no indication that evidence regarding the October or November 1976 meeting [where the purported offer was made] was presented to him [the arbitrator] . . . ." Ninth Circuit Decision, A-7.

The *Electronic Reproductions* precedent is also important here because it allowed for deferral without requiring the arbitral award to explicitly address statutory issues, and the arbitrator in *Max Factor* did not explicitly address said issues. In this regard, the *Electronic Reproduction* precedent states: "*For in discharge and discipline cases, the basic contractual issue is whether or not the grievant has been disciplined or discharged for just cause. It is of course obvious that 'just cause' does not include illegal or discriminatory reasons. Indeed, a showing that the true reason for the discipline was a discriminatory one negates any employer claim that the discharge or discipline was 'for just cause.' Arbitrators have repeatedly so held and have recognized clearly their responsibilities in this area. * * * [A]n artificial separation of [contractual and unfair labor practice or statutory] issues seems likely to lead, as it did herein, to piecemeal litigation in which a party may well prefer to have 'two bites of the apple,' trying part of the discharge case before the arbitrator but holding back evidence material to its claim so as to be able to pursue the matter in yet another proceeding before this Board.*" 213 NLRB No. 110, at p. 761 (citations omitted) (emphasis added).

Although the Board's *Max Factor* order thus reached exactly the opposite result from the one it should have reached under its own existing deferral policy, the Board's order did not expressly overrule *Electronic Reproduction,* nor did it explain its reasons for departing from that existing precedent. Instead, the *Max Factor* order merely made a vague reference in a footnote to the fact that some of the Board's present members disagreed with the *Electronic Reproduction* order at the time it was originally decided. Thus, contrary to the Ninth Circuit's view, the Board did state its reasons for not deferring here, and that statement of reasons shows that the Board failed to follow its own existing precedents, failed to state that it had decided to overturn those precedents, and failed to state its reasons for overturning said precedents.

A subsequent Board order issued almost a year later shed some light on the Board's apparent departure from its *Electronic Reproduction* deferral policies in its *Max Factor* order. In its *Atlantic Steel Co.* order in September 1979, the Board majority (again in a footnote) states that its *Max Factor* order "effectively overruled," its *Electronic Reproduction* order. 102 LRRM 1247, 1249. This subsequent order, however, still contained no explanation of why the Board majority had decided to depart from its existing deferral precedent. It was not until more than one full year after its *Max Factor* order that the Board expressly overruled its *Electronic Reproduction* order and explained its reasons for doing so. In *Suburban Motor Freight,* 103 LRRM 113 (January 8, 1980), the Board explained for the first time why it had decided to depart from *Electronic Reproduction.* Its language was as follows:

> "The Board can no longer adhere to a doctrine which forces employees to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter. Accordingly, we hereby expressly overrule *Electronic Reproduction,* and return to the standard for deferral which existed prior to that decision." *Suburban Motor Freight,* 103 LRRM at 1114.

The Board explained that it was departing from its *Electronic Reproduction* deferral policy because of its belief that statutory

rights of employees under the Act outweighed those policies favoring arbitration under the Act. 103 LRRM at 1114.

The first problem with the procedure the Board followed here is that while apparently deciding to abandon its existing *Electronic Reproduction* deferral policy in its December 1978 *Max Factor* order, the Board failed to explain that it was doing so and why it was doing so until over one year later in *Suburban Motor Freight.* In Section I of the Argument, petitioner pointed out that the Ninth Circuit ignored a basic tenet of American administrative law by not requiring the Board to explain the reasoning underlying its conclusion of repugnance. Another basic tenet of American administrative law is the one that requires an administrative agency to adhere to its own precedents, or to provide a reasoned explanation for departures from them. This Court articulated this principle in *Secretary of Agriculture v. United States,* wherein the Court held that an order of the Interstate Commerce Commission which departed from an established precedent was defective because "the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." 347 U.S. 645, 653, (1954).

This Court addressed a similar failure by an agency to explain a departure from an established precedent in *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd of Trade,* wherein the Court stated that "[w]hatever the ground for the departure from prior norms, ... it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." 412 U.S. 800, 808, (1973). The Court's holdings in this regard were followed by the United States Court of Appeals for the Second Circuit in *NLRB v. Horn & Hardart,* which held that once the Board "announce[s] a policy regarding deference to arbitration, [it cannot] blithely ignore it, thereby leading astray litigants who depended on it." 439 F.2d 674, 679 (1971). *Accord, Public Interest Research Group v. FCC,* 522 F.2d 1060 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976); *St. Luke's Memorial Hospital, Inc. v. NLRB,* 623 F.2d 1173 (7th Cir. 1980) (Board is not "free to flout its own procedures.").

The Ninth Circuit, however, in the instant decision has failed to require the Board to explain that it was departing from its existing precedents and to explain its reasons for doing so. The Ninth Circuit's failure to require the Board to explain this departure violates a basic tenet of adminstrative law, and for this reason also, the Ninth Circuit decision should be reversed.

Failure To Employ Rulemaking To Change Its Deferral Policies

Moreover, for a change in policy as significant as its decision to overrule *Electronic Reproduction,* the Board should have used rulemaking instead of adjudication. Petitioner expected the Board to adhere to its own *Electronic Reproduction* deferral policy. That policy had been in effect at all relevant times herein, i.e., when the company suspended and then terminated the employee, when the employee filed her grievance and unfair labor practice charges, when she participated in hearings for both, when the ALJ ruling and the arbitral award were issued, and when the company asked the Board to defer. The company was, of course, aware that the employee had submitted evidence to the ALJ of the purported offer of benefits that she had not submitted to the arbitrator, and that the ALJ had relied on said purported offer in finding that her suspension and termination were motivated by anti-union animus. Under the existing Board policy, deferral to the arbitral award was nonetheless appropriate. However, eleven months after petitioner asked the Board to defer, the Board refused. Since the Board's order failed to state either that it was overturning *Electronic Reproduction* or why it was doing so, petitioner continued to rely on the existing deferral policy and opposed the Board's petition for enforcement, which began a process of judicial review that has already occupied more than two years. Thus, petitioner has relied for over three years, since first requesting the Board to defer in January 1978, on the Board's *Electronic Reproduction* deferral policy.[5] Petitioner

[5] Petitioner's backpay liability for this three year period may be as much as $40,000, and petitioner has also expended substantial sums in legal fees and costs during said period.

believes that many other parties have similarly relied on the Board's existing deferral policy.

An alternative to the adjudication procedure used here by the Board could and should have been followed in making such a fundamental change in its deferral policies. The Board is empowered to use rulemaking to amend or rescind its existing policies and to articulate new ones. 29 U.S.C. §156. While the Board has discretion to choose between adjudication and rulemaking, this Court has stated that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The circumstances where rulemaking should be used instead of adjudication include the following:

> "An exception to the Board's free exercise of its discretion in choosing to adjudicate rather than proceed by rulemaking may arise: (1) where industry reliance on past decisions of the Board results in substantial 'adverse consequences,' (2) where the Board seeks to impose new liability on individuals 'for past actions which were taken in good faith reliance on Board pronouncements,' or (3) where fines or damages are imposed for the violation of Board policy newly announced in an adjudication. 'NLRB Policymaking: The Rulemaking-Adjudication Dilemma Revisited in *NLRB v. Bell Aerospace,*'" XXIX MIAMI L.REV. 559, 569 (1975).

In addition to the hardship on petitioner as discussed above, the deferral policy at issue herein is precisely the type of broad policy issue for which rulemaking is more appropriate than adjudication. Its resolution does not turn on close evidentiary questions and will have broad national application beyond the facts of this case. Requiring a rulemaking proceeding here would also ensure that a change in policies as fundamental as this one would be based upon fully articulated reasoning and an accurate perception of practical realities, rather than upon the constantly changing political complexion of the Board itself. Accordingly, this Court should reject the retroactive application on petitioner of the Board's change in

policy that has resulted from the Board's use of adjudication, and this Court should require the Board to conduct a noticed rulemaking proceeding regarding its intended change in said deferral policies.

The Substance of the Board's New Policy Is Not In Accordance With The Act

While the procedures followed by the Board were thus deficient, it is even more significant that the substance of the Board's new policy is premised upon an erroneous view of national labor law. The Board's previous deferral policy obliged it to defer to an arbitral award unless it was shown to be "clearly repugnant" to the purposes and policies of the Act, a pro arbitration standard based on the high value placed on arbitration under the Act. The Board's new policy is to undertake a *de novo* review of the merits of arbitral awards in each case to determine if the arbitrator heard every piece of evidence the Board heard and decided every issue precisely as would have the Board. This new policy will undermine the role of arbitration and, with it, the process of collective bargaining which lies at the very heart of the Act.

As discussed above, prior to the *Max Factor* order, the Board's deferral policy required employees who elected to proceed with arbitration to present all their evidence to the arbitrator, and the Board deferred to the resulting arbitral award unless it was shown to be "clearly repugnant" to the Act. In *Max Factor,* however, the Board changed the existing deferral policy by shifting the burden of presenting all available evidence from the employee, who can meet it, to the arbitrator, who cannot. While finding itself powerless to prevent this new policy from taking effect, the Ninth Circuit in its recent decision in *Ad Art, Inc. v. NLRB* stated that the new policy seemed inequitable:

> "One result of this return to pre-*Electronics Reproduction* deference policy is that parties may again withhold their statutory claims from the arbitrator to gain a second review by the Board. We are troubled with this possibility. When

> the statutory claim is incapable of being alleged as a contractual breach, we believe that a twofold review is proper. When, however, the alleged contractual breach is capable of being alleged as a statutory breach and the arbitral award resolves both, deference seems proper even if evidence of the statutory violation was not presented to the arbitrator. 106 LRRM 2011 (1980).

In his dissenting opinion to *Suburban Motor Freight,* Board Member Penello discussed the substance of the Board's new deferral policy as follows:

> "The decision to overrule *Electronic Reproduction* represents yet another step in the *ill-considered retreat* from a fair, balanced, comprehensive and efficacious accommodation between public and private mechanisms for the resolution of disputes. *Once again, a Board majority has rendered a decision which will promote the proliferation of litigation and impede the maturation of peaceable labor-management relations."* 103 LRRM at 1114-1115 (1980) (emphasis added).

As Member Penello indicates, by undermining arbitration and promoting mutiple litigation, the Board's new policy impedes the maturation of peacable labor relations. Member Penello states that he can "perceive no justification for allowing the relitigation of the merits of those claims before the Board." The employee in *Suburban Motor Freight* withheld allegations from the arbitrator which he presented to the Board in order to obtain reinstatement in that forum, as did the employee in *Max Factor.* Member Penello goes on to indicate that the purpose underlying the Board's prior deferral policy was to accord arbitration the measure of respect necessary for the proper functioning of the collective bargaining process:

> "The procedural rule in *Electronic Reproduction* facilitated full effectuation of the Board's Spielberg policy and derived its raison d'etre from principles underlying both *Spielberg* and *Collyer. Those principles, expressed in the Act and endorsed by the courts, commit the Board to the*

> *purpose of furthering collective bargaining by encouraging parties to resort to contractual means for the peaceful resolution of industrial disputes. Such a purpose can be fatally frustrated by permitting voluntary arbitration agreements to be avoided through multiple litigation of the same set of facts."* 103 LRRM at 1115 (emphasis added).

Further insight into the Board's *"ill-considered retreat"* from a fair deferral policy is found in Member Penello's concurring opinion in the Board's *Atlantic Steel Co.* order, 102 LRRM 1247 (1979). The majority opinion in *Atlantic Steel* states that its new deferral policy is to defer only where the arbitral award indicates that the arbitrator decided all underlying unfair labor practice issues, that "the arbitrator throughly considered all the evidence," and that the arbitrator's conclusions are consistent with Board law. 102 LRRM at 1249.[6] Applying this new Board deferral policy to the facts before it in *Atlantic Steel,* the Board majority deferred, but it used the opportunity to justify numerous other recent orders where it had refused to defer. Member Penello concurs in the result, but expresses his strong disapproval of the new deferral policy itself:

> "My colleagues go to some length to distinguish the instant case from those cited above. Yet each case involves an arbitration award which found that the grievant had cursed a management offical [sic] under circumstances in which such behavior was unacceptable. Of course there are differences in the cases, but they are differences of

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[6] The Board's new policy thus requires deferral only where the arbitrator treats the facts as statutory issues; shows that all evidence was presented to him; and indicates that he decided the case precisely as the Board would have on the merits. In discussing this new policy Board Member Penello states, in another recent order, that *the Board's new deferral policy "seeks to change the third Spielberg criteria from 'merely repugnant' to 'merely erroneous,' substituting their judgment for that of the arbitrator, whereas the traditional deferral policy required that once the parties submit a matter to arbitration, I (as a Board member) am bound by Spielberg to defer to the arbitral award where it is not clearly repugnant to the Act — even if I would otherwise disagree with the result reached by the arbitrator."* *Sea-Land Service,* 240 NLRB No. 147 (1979) (emphasis added).

degree rather than kind. *The only real distinction my colleagues have made is that they believe the arbitrator herein has made the right decision—that his award fully squares with Board precedent, that he applied the precise determinants of what is unacceptable behavior, and, ultimately, that his award reached a result with which they agree. My colleagues' standard for deferral is, thus, whether the award is in accord with the Act and Board precedent rather than the Spielberg standard of whether the award is clearly repugnant to the Act or wholly at odds with Board precedent.* My colleagues' mistake, I believe, is that they first look to the unfair labor practice complaint and hearing rather than to the arbitration award. In my view, my colleagues have not "deferred" to the arbitrator's award but have "adopted" it as if the arbitrator were some sort of unofficial administrative law judge." 102 LRRM at 1250 (emphasis added).

The Board's new policy, by allowing employees to withhold purported evidence from an arbitrator in order to ensure that the arbitral award will not be binding on the Board, provides the employee an unfair, one-sided opportunity to manipulate the result of arbitration in order to guarantee himself two forums in which to litigate his reinstatement claims. In his *Atlantic Steel* concurring opinion, Member Penello reiterates his belief, as stated in *Suburban Motor Freight*, that the Board's new deferral policy undermines both arbitration and collective bargaining and, consequently, does not further the purposes of the Act:

> "Deferral under such a standard furthers neither the aim nor the efficient administration of the Act but encourages full litigation before the Board of deferrable disputes. Strict attention to Spielberg standards would, however, further the purposes of the Act by encouraging the reliance on collective bargaining and its correlative offspring, grievance arbitration." 102 LRRM at 1250.

The Board refused to defer to the arbitral award in *Max Factor* under its new deferral policy. Since the employee here withheld certain of her allegations from the arbitrator (i.e., the

company's purported offer of benefits), the arbitral award could not satisfy that new policy. Thus, despite the fact that the employee here had every opportunity to litigate all of the claims arising out of her suspension and termination before the arbitrator[7], her conscious decision not to do so has guaranteed her a second forum. While she lost the arbitration, she won before the Board. Her strategy, because of the Board's new deferral policy, proved successful. As discussed herein, the Board's new policy undermines both arbitration and collective bargaining and is, accordingly, contrary to the purposes and policies of the Act and erroneous as a matter of law.

III.

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE THIRD AND NINTH CIRCUITS REGARDING THE PROPER SCOPE OF REVIEW OF A BOARD DECISION REFUSING TO DEFER TO AN ARBITRAL AWARD

In the instant *Max Factor* decision, the Ninth Circuit declared that the proper scope of review of a Board refusal to defer is to uphold that refusal whenever the Board has determined that the arbitrator's result differs from one which is consistent with the Act. In so holding, the Ninth Circuit decision, in footnote 7 thereof, expressly acknowledged a conflict between this scope of review and that followed by the United States Court of Appeals for the Third Circuit ("Third Circuit") in *NLRB v. Pincus Brothers, Inc.- Maxwell*, 620 F.2d 367 (1980). As will be shown below, the scope of review of the Third Circuit on this issue is more appropriate than is that of the Ninth Circuit.

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[7] The arbitrator states in his award that "The arbitration was conducted . . . on September 19, 20, and 21, and November 2 and 3, 1977, in accordance with the terms of the contractual agreement binding the parties. All parties to this proceeding were afforded a full and adequate opportunity to present evidence, call witnesses who were duly sworn, and offer argument. . . . The parties filed timely briefs in conformity with their agreement."

The Third Circuit's *Pincus Bros.* decision, like the Ninth Circuit's *Max Factor* decision, involved an employee who was terminated, filed both a grievance and an unfair labor practice charge, and voluntarily pursued the grievance through to arbitration and lost. Thereafter, the Board, in *Pincus Bros.* as in *Max Factor,* refused to defer to the arbitral award which upheld the termination. In *Pincus Bros.*, the Board found the employee's conduct to be *protected* under the Act and held that deferral to the arbitral award would, therefore, be repugnant. When the order in *Pincus Bros.* was considered by the appellate court, however, the Third Circuit found the employee's conduct to be *arguably unprotected,* and held that since the employee's conduct may or may not be repugnant, it cannot be *clearly repugnant,* under the Board's traditional deferral policy. The Third Circuit then ruled that the Board should have deferred to the arbitral award under that traditional deferral policy and that its failure to do so was an abuse of discretion, stating:

> "Based on the Board's *Spielberg* doctrine, congressional action, and judicial decisions of the Supreme Court as well as this Circuit, we conclude that it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy." 620 F.2d at 374 (1980).

Thus, the Third Circuit, by closely scrutinizing the Board's refusal to defer, determined that it had not adhered to its traditional policy and then required the Board to adhere to that policy.

In contrast, the Ninth Circuit adopted a very broad scope of review, involving no real scrutiny of the Board's refusal to defer. To the Ninth Circuit, if the employee's conduct was arguably unprotected or arguably inconsistent with the Act, it was also arguably protected, and therefore the arbitral award may not be consistent with the Act and the Board need not defer to it. This scope of review allows the Board to refuse to defer on a "merely erroneous" standard whenever it has determined that it would have decided the case differently, including where it would decide the case differently because

different evidence was presented to it. Thus, the Ninth Circuit's scope of review allows the Board to implement its new deferral policy, although the Ninth Circuit beclouds this fact by couching its decision in traditional "clearly repugnant" language:

> "Where the Board determines that the arbitrator's result differs from one which is appropriate under the Act, it may decline to defer on the grounds that the arbitral award is clearly repugnant to the Act . . . ." Ninth Circuit Decision, Appendix, p. A-13.

In expressly declining to follow the scope of review of the Third Circuit, the Ninth Circuit states (at footnote 7 of its decision) that the Third Circuit's scope of review would impose a difficult burden on the Board. That difficult burden, however, is precisely the burden required by the Act and by decisions of this Court. That burden, which is embodied in the Board's prior deferral policy, is a burden imposed for the purpose of promoting arbitration as the preferred method of resolving disputes and thereby promoting the process of collective bargaining, as the Third Circuit indicates in the following portion of its decision:

> "The *Spielberg* doctrine evolved as a means of accommodating the national policy in favor of the private resolution of labor disputes through consensual arbitration. That policy finds expression in Section 203(d) of the Act, 29 U.S.C. §173(d)(1976), which declares: 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' As more fully explained in *International Harvester Co.*, 138 N.L.R.B. 923 (1962), the source of the Board's deferral policy is rooted in both congressional and Supreme Court pronouncements.
>
> The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collec-

> tive bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of this statutory objective. . .
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> *Id.* at 926." 620 F.2d at 372 (citations omitted).

The inconsistent scopes of review followed by the Third and Ninth Circuits results from their differing reactions to the Board's attempt to replace its traditional policy regarding arbitration with a new, less deferential policy. The Third Circuit's scope restricts the Board's recent attempt to replace the deferential, "clearly repugnant" policy with a less deferential, "merely erroneous" or "inconsistent" policy. The Ninth Circuit's scope, on the other hand, accepts the Board's new deferral policy. The difference between the two scopes of review is real and significant and results in contradictory results on the same set of facts. This Court should decide which scope of review is appropriate under the Act.

IV.

THE NEW POLICIES ADVANCED BY THE BOARD AND ACCEPTED BY THE NINTH CIRCUIT ARE PREMISED ON AN ERRONEOUS VIEW THAT *ALEXANDER V. GARDNER-DENVER* IS APPLICABLE TO CASES UNDER THE NATIONAL LABOR RELATIONS ACT

The Board's prior deferral policy, as discussed in the preceding sections of the Argument (and particularly in footnote 4 herein), presumed that an employee presented all available evidence of statutory claims to the arbitrator and that such statutory claims were resolved by the arbitral award. Its new deferral policy is just the opposite, as indicated in its recent *Suburban Motor Freight* order, where the Board stated that it was abandoning the presumption that all evidence was presented to and all statutory issues resolved by the arbitrator because the Board now believes that the policy of protecting an

employee's statutory rights conflicts with and outweighs the policy favoring arbitration. 103 LRRM 1113 (1980). Similarly, the Ninth Circuit recently agreed that the policies favoring statutory rights and those favoring arbitration are conflicting and that the former outweighs the latter and, consequently, has accepted the statutory versus contractual distinction of the Board's new deferral policy. In *Ad Art, Inc. v. NLRB*, the Ninth Circuit expressly stated that a weighing of conflicting policies was critical to determining when and if the Board should defer:

> "Resolution of the issue [i.e. deferral] requires an accommodation of two competing policies. *Id.* at 5216. One policy favors exercise of the Board's jurisdiction to prevent unfair labor practices. The other policy favors settlement of labor disputes through arbitration. *See Gateway Coal Co. . . .*" 106 LRRM at 2011.

In this final section of the Argument, petitioner submits that the new policy on arbitration advanced by the Board and accepted by the Ninth Circuit is premised on an erroneous belief that the conflict between statutory and arbitration policies that does exist in Title VII cases, as explained by this Court in *Alexander v. Gardner-Denver*, also exist in cases under the National Labor Relations Act.

In *Alexander v. Gardner-Denver*, this Court held that deferral to a prior arbitral award is never appropriate when an employee seeks to vindicate his statutory, Title VII rights in a judicial proceeding. 415 U.S. 36, 48 (1974). That holding, which prohibits deferrral in Title VII cases, was based on Title VII's legislative history, which shows a clear Congressional intent to allow "parallel or overlapping remedies against discrimination" because of Congressional belief that the policy against discrimination was of the "highest priority." 415 U.S. at 48. That holding was also based on the fact that claims of racial or other discrimination are not adequately resolved in arbitration proceedings where the collective interest of all the employees is the focus, and where the individual's right to be free of racial as other discrimination is not adequately pro-

tected. 415 U.S. at 56.[8] For these reasons, the Court specifically found that a conflict exists in Title VII cases between the policies against discrimination and those favoring arbitration and the Court resolved that conflict by holding that an arbitral award can never be deferred to, although it can be accorded some weight in the separate judicial proceeding. 415 U.S. at 56.

A comparison of the Board's prior and its new deferral policies indicates that the Board has now concluded that the rejection of arbitral deferral in *Alexander v. Gardner-Denver* should be adopted for NLRA cases and that the Board has, consequently, departed from its traditional deferral policy. The Board's new policy refusing to defer unless the arbitral award explicitly resolves all statutory claims is obviously a result of the adoption of *Alexander v. Gardner-Denver* reasoning, as is its underlying rationale that policies favoring statutory rights conflict with and outweigh those favoring arbitration. The error of the Board and the Ninth Circuit in so concluding lies in their failure to distinguish Title VII from NLRA cases. In Title VII cases, there are two conflicting policies at issue, which are judicial protection of statutory rights against discrimination and judicial furtherance of the arbitration process. In cases under the Act, no similar conflict exists. Consequently, the statutory versus contractual distinction of *Alexander v. Gardner-Denver* is inapplicable to cases under the Act.

The policies underlying the Act do not conflict with the policies favoring arbitration. The Act seeks to promote industrial peace through collective organization, bargaining and arbitration. Through this private system of self-government, Congress intended to promote peaceful labor-management relations. Arbitration, which the Act expressly declares to be the preferred method of dispute resolution, is an integral part of achieving the Act's purpose of industrial peace through self-government, as Professor Shulman explained in an important essay on the topic:

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[8] *See also* Gould, "Labor Arbitration Of Grievances Involving Racial Discrimination," 118 U.PA.L.REV. 40 (1969).

> "The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise. . . . It is a means of making collective bargaining work and thus preserving private enterprise in a free government." Shulman, "Reason, Contract And Law In Labor Relations," 68 HARV.L.REV. 999, 1024 (1955).

Among the major reasons why arbitration works in the labor-management context is because it is perceived as fair, final, and efficient. As a consequence, both labor and management willingly participate and obey the resulting awards. A significant number of arbitrations, perhaps over one-third, concern discipline or discharge cases, *30 F.M.C.S. Ann.Rep. 43-44* (1977). If fairness and finality are eliminated from such arbitrations, willing participation and obedience by management will suffer, even though management will still initially agree to arbitration clauses in exchange for no-strike clauses, as the Court pointed out in *Boys Market, Inc. v. Retail Clerk's*, 398 U.S. 235 (1970). Faced with the employee's unfair advantage of two forums in which to win reinstatement, and with arbitral awards which have no binding significance, management will seek to delay or frustrate the only one of said two forums which it can effect, which is arbitration.

The Board's new policy regarding arbitration, however, indisputably eliminates both finality and fairness from discipline arbitrations. There is no *finality* to arbitral awards when the Board's former "clearly repugnant" deferral policy is replaced by a "merely erroneous" review of the merits. There is no *fairness* when the employee can guarantee himself two bites of the apple by consciously withholding evidence from the arbitrator. In requiring the arbitral award to resolve all possible statutory charges that the employee may present to the Board, and in assuming that disposition of the contractual issues does not resolve the statutory ones, the Board's new policy effectively compels a lesser role for arbitration and a concommittant increased intervention by the Board. The result is to undermine the collective bargaining process.

In an article explaining why *Alexander v. Gardner-Denver* should not be adopted for cases under the Act, the former General Counsel of the Board, Peter Nash, states:

> "The Board's twin deferral doctrines (i.e., *Spielberg* and *Collyer*) proceed from the premise that the Act's goal of achieving industrial peace can best be served by encouraging private parties to utilize procedures agreed upon in collective bargaining rather than the Board's procedures when disputes present both contractual and unfair labor practice issues." Nash, Board Referral to Arbitration and *Alexander v. Gardner-Denver:* Some Preliminary Observations, 25 LAB. L.J. 259 (1974)

Nash points to the different policies underlying the two Congressional enactments and states that arbitration, while antithetical to the policies of Title VII, is an integral part of the policies of the Act:

> "The National Labor Relations Act, by contrast, seeks to achieve industrial peace by encouraging 'practices fundamental to the friendly adjustment of industrial disputes' and 'the practice and procedure of collective bargaining. . . .' Section 203(d) states that 'final adjustment by a method agreed upon by the parties is . . . the desirable method of settling grievance disputes.' Judicial enforceability of collective bargaining agreements is spelled out by Section 301. *Thus, unlike Title VII, the NLRA prohibits unfair labor practice conduct only as an integral part of a comprehensive regulatory scheme designed to promote industrial peace by fostering free collective bargaining.*" Id. at 321 (emphasis added).

Nash goes on to examine the legislative history behind the Act, and explains that arbitration was intended to be an integral part of carrying out its statutory purposes:

> "The legislative history of the 1947 amendments to the Act provides further evidence of the Congressional policy to encourage the settlement of contractual disputes through the machinery established by the parties. . . . [I]t stated that it did not intend the Board to become the 'forum for

> trying day-to-day grievances' since that would be inimical to the development by the parties . . . of adequate machinery." Id. at 266.

Nash concludes that "*while court deferral [to arbitral awards] does not serve the ends of the Civil Rights Act, it is perfectly consistent with the proper administration of the federal labor laws.*" Id. at 267 (emphasis added).

A related law review reaches a similar conclusion. It explains that *Alexander v. Gardner-Denver* was not intended by the Court to be construed any broader than as the resolution of the potential conflict between Title VII and arbitration:

> "[T]he accommodation effected by the Supreme Court in *Alexander* should be viewed not as a reversal of the national policy favoring arbitration, but simply as a refusal to extend that policy in a way which would bring it into direct conflict with the national antidiscrimination policy.
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> * * *
>
> "While the Court does draw a statutory-contractual distinction, its decision is plainly limited to specific statutory rights: those arising under Title VII. . . . [T]he case is limited to Title VII, and holds merely that Title VII rights can be supplemented but not supplanted by the traditional arbitration process." Cone & Nash, "*Alexander v. Gardner-Denver* and Deferral to Labor Arbitration." 27 HAST.L.J. 403, 425 (1975).

In support of the position that the *Alexander v. Gardner-Denver* holding prohibiting deferral should not be applicable to arbitral awards considered by the Board, Dean St. Antoine writes:

> "The *Gardner-Denver* distinction between deference in NLRA cases and nondeference in Title VII cases seems supportable on at least two grounds. First, racial discrimination (as well as religious and sex descrimination) presents peculiarly sensitive and difficult problems. Their solution has received the highest priority. Second, the

NLRA deals essentially with collective rights. It therefore is more appropriate that a union and an employer should be able to make a final and binding settlement, or provide for its equivalent through arbitration, with regard to collective rights than with regard to individual rights. A court of appeals, in *Satterwhite v. United Parcel Service, Inc.*, relied on both these points in declining to examine de novo under the Fair Labor Standards Act certain wage claims that had previously been the subject of an adverse arbitration award." St. Antoine, "Judicial Review of Arbitration Awards: A Second Look At Enterprise Wheel and Its Progeny," 30 NAT'L ACAD. ARB. PROC. 29, 49 (1977).

In conclusion, petitioner submits that the traditional deferral policy followed by both the Board and the Ninth Circuit until *Max Factor* is correct and that the recent departure from that deferral policy results, in part, from an erroneous belief that the *Alexander v. Gardner-Denver* holding is applicable to cases arising under the Act. This Court should declare that its decision in *Alexander v. Gardner-Denver* is inapplicable to cases under the Act, and it should require the Board to follow a deferral policy in accordance with the purposes and policies of the Act.

Respectfully Submitted

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MAX FACTOR & CO.

and

Cases 31—CA—6798 and
31—CA—6827

LUISA GRATZ, an Individual

DECISION AND ORDER

On November 11, 1977, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to Respondent's exceptions and in support of the Administrative Law Judge's Decision. Respondent, urging the *Spielberg* doctrine, subsequently filed an additional motion for reconsideration of the Adminstrative Law Judge's Decision and dismissal of complaint. The General Counsel filed a motion to strike Respondent's motion, with a letter statement in support, and the Charging Party filed a statement in support of the General Counsel's motion and opposing Respondent's motion for dismissal.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered Respondent's motion for reconsideration of the Administrative Law Judge's Decision and dismissal of the complaint based on deferral to an arbitrator's award issued after the Administrative Law Judge's Decision. Respondent cites the *Spielberg*[1] case in support of its motion. In *Spielberg*, Respondent defended, *inter alia*, on the ground that its refusal to reinstate certain strikers was in accordance with a prior arbitration award by which all parties

[1] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

had agreed to be bound. After issuance of the award, finding that Respondent was not obligated to reinstate the individuals concerned, a charge was filed with the Board. The Board agreed with the trial examiner that the Board is not bound by an arbitration award, noting that the Board has exercised its discretion to remedy unfair labor practices "even though the parties has used arbitration," for, as the court stated in *N.L.R.B. v. Walt Disney Productions*, 146 F.2d 44 (9th Cir. 1945) U.S. 877, "Clearly, agreements between private parties cannot restrict the jurisdiction of the Board."

The Board, however, in the circumstances of that case decided to exercise its discretion to recognize the arbitrator's award, noting that the arbitration itself was part of a strike settlement agreement ratified by the employees, and that all parties had actively participated and acquiesced in the arbitration proceeding. The Board went on to note that "In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."

We have carefully reviewed the arbitrator's award relied on herein by Respondent. It does not appear that the arbitration proceedings were other than fair and regular, nor does any party so contend. However, the Charging Party and the General Counsel contend that deferral to the arbitration award herein would engender a result repugnant to the purposes and policies of the Act. We agree. The arbitrator did not pass on the unfair labor practice aspects of the Charging Party's suspension and discharge herein, nor did he specifically consider the additional unfair labor practice allegations which the Adminstrative Law Judge found went to the heart of the Act and were closely interwoven with Respondent's warning, suspending, and discharging the Charging Party. We conclude therefore that deferral to the arbitration award herein would not effectuate our protection of Section 7 rights, but rather would be repugnant to the purposes and policies of the Act. Furthermore, as the arbitration hearing took place after the

Board's hearing in this proceeding and as the arbitrator's decision issued *after* that of the Administrative Law Judge, deferral would be unwarranted irrespective of the merits of the arbitration proceeding (including the arbitrator's decision), under *Spielberg* standards.[2] Accordingly, we hereby deny Respondent's motion to dismiss the complaint and defer this matter to arbitration.[3]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[4] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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[2] *Timpte, Inc.*, 233 NLRB No. 162, fn. 2 (1977).

[3] See *General American Transportation Corporation*, 228 NLRB 808 (1977); *National Rejectors Industries*, 234 NLRB No. 34 (1978). We note also the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Stephenson v. N.L.R.B.*, 550 F.2d 535 (1977), to the effect that the Board should not defer when the arbitrator has not considered the statutory issues, a position the Board has itself taken in such cases as *Monsanto Chemical Company*, 130 NLRB 1097, 1099 (1961). The court also indicated its approval of an additional prerequisite to the *Spielberg* formula based on the arbitral tribunal having decided only issues in its competence, as suggested by the Circuit Court of Appeals for the District of Columbia in *Banyard v. N.L.R.B.*, 505 F.2d 342, 347 (1974).

Member Murphy, with reference to the latter issue, is not in accord with a criterion that requires the Board to pass on the competence of an arbitral tribunal to decide a particular issue. However, in *The Kansas City Star Company*, 236 NLRB No. 119 fn. 1 (1978), she expressed disagreement with *Electronic Reproduction Service Corporation, et al.*, 213 NLRB 758 (1974), of which the court, in *Stephenson, supra*, was critical as showing Board willingness to defer to an arbitrator's award even though no indication is given that the arbitrator considered the unfair labor practice issue. In *Electronic Reproduction*, Members Fanning and Jenkins dissented on that issue.

[4] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1960), enfd. 188 F.2d 362 (3d Cir., 1951). We have carefully examined the record and find no basis for reversing his findings. An inadvertent error appears in fn. 9 of the Administrative Law Judge's Decision, which is hereby corrected to read as follows: "Maxwell is black. Gratz and Bryant are white."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Max Factor & Co., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C., December 13, 1978

John H. Fanning, Chairman

Howard Jenkins, Jr. Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

FILED
SEP 9 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MAX FACTOR AND COMPANY,
Respondent,
v.
LUISA GRATZ,
Intervenor.

NO. 79-7118
OPINION

Petition to Enforce Order of
National Labor Relations Board
Argued and Submitted June 2, 1980

Before: GOODWIN and PREGERSON, Circuit Judges, and SCHWARZER,* District Judge

SCHWARZER, District Judge:

The National Labor Relations Board and Intervenor Luisa Gratz petition under 29 U.S.C. Section 160(e) for enforcement of the Board's order against Max Factor and Co. ("Factor"). The controversy arose out of Factor's discharge of Gratz who then filed unfair labor practice charges under Sections 8(a)(1)

* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

and (3) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1) and (3). Shortly thereafter the union grieved the discharge under the collective bargaining agreement and took it to arbitration. After a hearing on the unfair labor practice charges, an administrative law judge ("ALJ") found that Factor had violated the Act and ordered reinstatement. While the ALJ's decision was pending before the Board on exceptions, the arbitrator, after hearing, issued his decision sustaining the discharge as having been for good cause. Factor's subsequent request to the Board to defer to the arbitrator's decision was rejected by the Board which adopted the ALJ's decision.[1] We grant enforcement.

I. Facts

Gratz was chief union steward at Factor's Los Angeles plant until February 3, 1977. In the course of efforts to process a large backlog of grievances, an unsatisfactory relationship developed between Gratz and Factor's director of industrial relations, Bill Piercy, and personnel manager, James Bryant. Gratz was given disciplinary warnings on December 9 and 27, 1976, suspended on December 27, and discharged February 3, 1977. The ALJ found that during October or November, 1976, Bryant and Piercy called Gratz into Bryant's office to tell her they felt she was spending too much time on union business and not enough time on production work. He accepted Gratz's testimony that during the conversation they suggested that she consider taking a management position with Factor or returning to law school at Factor's expense and giving up her job as chief steward. He concluded that this was an offer of economic benefits for giving up a union office, a violation of Section 8(a)(1). The ALJ also found that Factor's disciplinary warnings to Gratz on December 9 and 27, 1976, ostensibly for spending too little time on production work, were motivated by Gratz's devotion and energy on behalf of the union as chief

[1] The Board's Decision and Order are reported at 239 NLRB No. 99, 100 LRRM 1023 (1978)

steward. When Bryant gave her the December 27 warning, Gratz responded angrily, accusing him of "kissing the ass" of a Factor vice president and calling Bryant "a big phoney" and "a little twerp." Factor then suspended her for the stated reason that she had violated plant rules by using profane and abusive language. The ALJ found that Gratz's conduct occurred in the course of her duties as chief steward and in response to an unlawful disciplinary warning, and was not so flagrant, violent, or serious as to forfeit the protection of Sections 8(a)(3) and (1) of the Act. He concluded that Gratz's subsequent discharge on February 3, 1977, following another incident with Bryant was motivated by her pursuit of protected activities as chief steward, and rejected as pretextual the reasons offered by Factor: insufficient production work, use of abusive language, and insubordination.

The ALJ made specific findings of fact to support his conclusion that Factor's actions were motivated by a purpose forbidden by Sections 8(a)(1) and (3). The most significant findings were that Factor's management was concerned about the large backlog of pending employee grievances and disapproved of Gratz's manner of handling the grievances as chief steward. He found that Piercy felt Gratz had failed to compromise pending grievances or to discourage the filing of unfounded and duplicative grievances, and that Bryant had repeatedly complained that Gratz was too "pushy" and "aggressive" and had a "bad attitude" and that he twice said he would "get" her for actions she took as chief steward. The ALJ supported his finding that Factor's reliance on Gratz's low production work hours was pretextual by findings that other chief stewards had not been subject to the same demands. Inasmuch as the deferral issue was not raised before the ALJ, he made no findings on it.

On January 3, 1978, 23 days after ALJ's decision, the arbitrator issued his opinion and award. There is no indication that evidence regarding the October or November, 1976 meeting was presented to him, but he discussed the events of

December, 1976, through February, 1977, at length. He found that the suspension and discharge were for just cause and accepted Factor's stated reasons as valid. He found that Gratz spent much less than 50 percent of her time on production work. Based on the testimony of other chief stewards that they spent more than 50 percent of their time on production work, the arbitrator rejected the union's defense that the production work requirement was not "fair." The arbitrator's opinion does not discuss this "defense" in terms of statutory rights, but notes only that unfair labor practice charges were filed with the Board. No statutory provisions, court cases, or Board decisions are cited. The arbitrator also sustained Factor's other stated reasons for suspending and discharging Gratz. He found that the various instances of conflict between Gratz and Bryant were caused by her unwarranted attitude that as chief steward she was "equal to or above the management people she had to deal with." (R 94-95, 97-98, 100, 103). Regarding Gratz's abusive language toward Bryant, the arbitrator found that such conduct was not "incidental to the carrying out of the official duties of a Union representative" and created just cause for disciplinary action. (R 97, 104).

II. Deferral to Arbitration

This case again confronts the court with the troublesome issue of whether, and under what circumstances, the Board's refusal to defer to an arbitrator's decision should be upheld. Resolution of that issue requires accommodation of two important policies which are in tension: the policy favoring the exercise of jurisdiction by the Board to prevent unfair labor practices[2] and the policy favoring the "settling of labor disputes

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[2] 29 U.S.C. Section 160(a) provides, in part:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .

by arbitration." *United Steelworkers of America v. Enterprise, Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 377-79 (1974).[3]

The task of making that accommodation in any particular case is, in the first instance, the Board's and to that end it has wide discretion to decide whether to defer. *Hawaiian Hauling Service, Ltd. v. NLRB*, 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977). In that case we said that:

> The Board has established criteria to guide its decision and to this extent self-imposed restraints limit its discretion. In reviewing the Board, we must insure that it adheres to its own standards until they are properly changed by the Board. We will not deny enforcement unless the Board clearly departs from its own standards or its standards are themselves invalid. (*Id.*)

See also Stephenson v. NLRB, 550 F.2d 535, 537 (9th Cir. 1977); *Alfred M. Lewis Inc. v. NLRB*, 587 F.2d 403, 407 (9th Cir. 1978); *NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367, (3rd Cir. 1980); *Local 700, Int. Assn. Mach. & Aero Workers v. NLRB*, 525 F.2d 237, 239 (2nd Cir. 1975); *cf. Carey v. Westinghouse Corp.*, 375 U.S. 261, 270-71 (1964); *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 16-17 (1974).

The fountainhead of the deferral policy is *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), in which the Board announced that it would defer to an existing arbitration award (upholding employee discharges) and dismiss an unfair labor

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[3] Labor Management Relations Act, Section 203(d), 29 U.S.C. Section 173(d), provides, in part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .

practice charge where (1) the arbitration proceeding appeared to have been fair and regular, (2) all parties agreed to be bound, and (3) the arbitrator's decision was not "clearly repugnant to the purposes and policies of the Act." *See also, International Harvester Co.*, 138 NLRB 923, *enforced sub nom., Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (also a discharge case).

Subsequently the Board extended that policy to cases involving disputes subject to arbitration under a collective bargaining agreement but not yet submitted to arbitration. *Collyer Insulated Wire*, 192 NLRB 837 (1971). *See, e.g., NLRB v. Safeway Stores*, ___ F.2D ___, No. 78-3123 (9th Cir., June 16, 1980). Although a majority of the Board has rejected the *Collyer* policy of deferral to prospective arbitration, at least as applied to individual rights cases under Sections 8(a)(1) and (3), *see General American Transportation Company*, 228 NLRB 808 (1977), the *Spielberg* policy appears to remain in effect.[4]

The Board here gave three reasons for its decision not to defer to the arbitrator's award:

(1) "that deferral to the arbitration award herein would engender a result repugnant to the purposes and policies of the Act";

(2) that, because "[t]he arbitrator did not pass on the unfair labor practice aspects of the Charging Party's suspension and discharge herein, nor did he specifically consider the

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[4] In *General American*, two members rejected *Collyer* type deferral to arbitration altogether on the ground that it was contrary to the language and policy of the Act. Two members continued to support *Collyer*. The chairman, while continuing to adhere to *Spielberg*, concurred with the decision not to defer on the ground that *Collyer* type deferral is inappropriate in individual rights cases arising primarily under Sections 8(a)(1) and (3). Thus deferral to prospective arbitration, as opposed to an existing award, was rejected by the majority. *See, also, Kansas City Star Company*, 236 NLRB 866 (1978). *But compare Filmation Associates, Inc.*, 227 NLRB 1721 (1977), in which a majority held that *Spielberg* would not be applied to a case under Section 8(a)(4) (discharge because the employee testified before the Board).

additional unfair labor practice allegations which the Administrative Law Judge found went to the heart of the Act and were closely interwoven with Respondent's warning, suspending, and discharging the Charging Party . . . deferral to the arbitration award would not effectuate our protection of Section 7 rights . . ."; and

(3) that deferral would be unwarranted regardless of the merits under *Spielberg* because the arbitration hearing took place after the hearing before the ALJ and the arbitrator's decision issued after the ALJ's.[5] 239 NLRB at , 100 LRRM at 1023.

The first of the Board's three reasons is based on one of the original *Spielberg* criteria. Having found that the arbitral proceedings were fair and regular and that the parties had agreed to be bound, the Board's decision states that deferral would engender a result repugnant to the Act. Although the

[5] As we read the Board's decision, its conclusion that deferral would be repugnant does not turn on the sequence of the proceedings before the ALJ and the arbitrator. We have difficulty with the Board's reasoning in support of this third ground. The applicability of the *Spielberg* policy does not turn on whether the arbitrator's hearing and award preceded the ALJ's hearing and decision. The Board's only authority on this point is footnote 2 of its decision in *Timpte, Inc.*, 233 NLRB 1218 (1977). *Timpte* is distinguishable for two reasons: first, the employer in that case had at no time made a request for deferral under *Spielberg*, and secondly, deferral would have been to prospective arbitration under *Collyer* which the Board's majority had rejected in *General American Transportation Corp., supra.* The statement in the *Timpte* footnote relied on here, that deferral is unwarranted when the arbitration hearing took place after the ALJ hearing and the arbitrator's decision issued after the ALJ's, is therefore nothing more than dictum. In this case the grievance proceedings were roughly concurrent with those before the ALJ. We are unable to see what difference, it would have made to the decision whether to defer under *Spielberg* if the arbitrator's hearing and award had come first. If the sequence of proceedings were determinative, "those who would prefer a Board decision would need only to stall the arbitration process. Such a result would undermine the federal policy in favor of arbitration." *Lodge 1327, International Association of Machinists and Aerospace Workers v. Fraser & Johnston Co.*, 454 F.2d 88, 91 (9th Cir. 1971), *cert. denied,* 406 U.S. 920 (1972).

Board's decision contains no supporting analysis of the repugnance criterion,[6] it affirms the ALJ's findings and conclusions and adopts his recommended order. On the basis of those

[6] We read the Board's decision as reaching the conclusion that deferral would be repugnant to the Act on grounds which are independently sufficient and separate from the additional stated reason that the arbitrator "did not pass on the unfair labor practice aspects of the . . . suspension and discharge . . . ." In *Stephenson v. NLRB,* 550 F.2d 535 (9th Cir. 1977), this court, over the strong dissent of Judge Kunzig, followed *Banyard v. NLRB,* 505 F.2d 342 (D.C. Cir. 1974), in holding that deferral was improper, even though the *Spielberg* criteria were met, because the arbitrator had not specifically considered and decided the unfair labor practice issue. The *Banyard* criteria have been criticized, *see* R. Garmon, Labor Law 742 (1976); Recent Cases, *Banyard v. NLRB,* 88 Harv. L. Rev. 804 (1975). There is reason to question whether the *Stephenson* majority's endorsement of the *Banyard* requirement was necessary to its holding. In *Stephenson,* the court refused to enforce a Board decision deferring to arbitration on the basis of what was then the Board's policy announced in *Electronic Reproduction Corp.,* 213 NLRB 758 (1974). The *Electronic Reproduction* policy was to defer in all discharge or discipline case unless unusual circumstances were shown which caused a failure to introduce before the arbitrator evidence relevant to the unfair labor practice charge. Rejection of the *Electronic Reproduction* presumption in favor of deferral did not require the *Stephenson* court to adopt the *Banyard* criteria. Moreover, the arbitrator's function is to decide contractual issues; whether this function properly includes consideration of statutory unfair labor practice issues is a matter of deep controversy in the profession. *Compare, e.g.,* B. Meltzer, *Ruminations About Ideology, Law,* and *Labor Arbitration, in The Arbitrator, the NLRB, and the Courts,* Proceedings of the 20th Annual Meeting, National Academy of Arbitrators 1, 14-19 (1967), *with* R. Howlett, *The Arbitrator, the NLRB, and the Courts, Id.* at 67, 77-88, *and* M. Sovern, *When Should Arbitrators Follow Federal Law?,* Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators 29 (1970). We see no useful purpose served, in cases where the arbitral award is not clearly repugnant to the Act, by precluding deferral because of uncertainty about whether the arbitrator intended to decide the statutory unfair labor practice issues. *Cf.* J. Kurtz, *Arbitration and Federal Rights Under Collective Agreements in 1976,* Arbitration 1977, Proceedings of the 30th Annual Meeting National Academy of Arbitrators 305 (1977) ("An analysis of the court and NLRB decisions dealing with *Spielberg* during the past year makes it difficult to see how the two additional prerequisites requested by the *Stephenson* majority would add anything of substance to the existing three prerequisites, especially the requirements that the proceedings be fair and regular and that the resulting arbitration award not be repugnant to the policies and purposes of the NLRA.") *But see, Suburban Motor Freight Inc.,* 247 NLRB No. 2, 103 LRRM 1113, 1114 (1980).

findings and conclusions, the Board could reasonably conclude that Factor's activities constituted a sufficiently flagrant interference with protected activities that the duty to prevent unfair labor practices outweighed the policy of encouraging arbitration by deferring. We therefore find no abuse of discretion in the Board's conclusion that deferral would engender a result repugnant to the Act.

Our reasoning in *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (9th Cir. 1979), is not inconsistent with this conclusion. In *Douglas Aircraft*, this court set aside a Board decision refusing to defer where an arbitral award was based on two grounds, one permissible and one impermissible under the Act. We held that the Board should not have disregarded a clarification which established that the arbitrator had intended the two grounds to be independent, not cumulative. As an independent ground for our decision, we held that "the Board should have deferred because a plausible interpretation of the ambiguous award was consistent with the Act, and thus the award was not 'clearly repugnant' to the Act.' " 609 F.2d at 355.

The Board's decision in the instant case does not involve the "[o]verzealous dissection of [arbitral] opinions by the NLRB" that concerned this court in *Douglas Aircraft. Id.* The Board's reliance on *Spielberg's* repugnance criterion in this case does not rest on any ambiguity in the arbitrator's rationale, but rather on the repugnance of the result he reached. There is no danger that the Board's decision not to defer will "deter the writing of full opinions." *Id. Douglas Aircraft* does not, therefore, bar deferral in this case on the ground of the arbitral award's repugnance to the Act.

Where the Board determines that the arbitrator's result differs from one which is appropriate under the Act, it may decline to defer on the ground that the arbitral award is clearly repugnant to the Act if it finds that the interest in affording the Act's protection is so compelling under the circumstances that it outweighs the interest in encouraging private resolution of

disputes through arbitration.[7] The Board has wide discretion to apply its *Spielberg* criteria. *See, e.g., Alfred M. Lewis, Inc. v. NLRB, supra; Hawaiian Hauling Service, Ltd. v. NLRB, supra.* A fuller statement by the Board of its reasons for this conclusion would, as Judge Pregerson states, have been helpful. *Cf. District 1199E, National Union of Hospital and Health Care Employees v. NLRB,* 613 F.2d 1102, 1108-09 (D.C. Cir. 1979). We cannot say, however, that its refusal to defer on the ground of repugnance to the Act was, on the record before the ALJ, an abuse of discretion.

III. Substantiality of Evidence Supporting the Board's Finding.

Board findings on unfair labor practice charges will be affirmed if supported by substantial evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 491 (1951). Substantial

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[7] The Third Circuit has recently relied on our opinion in *Douglas Aircraft, supra,* to support a contrary interpretation of the *Spielberg* criterion. In *NLRB v. Pincus Brothers, Inc.-Maxwell,* 620 F.2d 367 (3d Cir. 1980), the court held that if an employee was discharged for conduct that is "arguably unprotected" under the Act, then the Board may not rely on the "clearly repugnant" criterion of *Spielberg* as a reason for refusing to defer to an arbitral finding that there was just cause for the discharge. *Id.* at 375. We decline to follow *Pincus Brothers* for several reasons. First, we question the authority for interpreting the Board's self-imposed *Spielberg* criterion differently than the Board has done or given litigants reason to expect. Second, the "arguably unprotected" standard would impose a difficult burden on the Board: before it could exercise its statutory jurisdiction, it would have to rule out every arguable rationale for finding the employee's conduct unprotected. Because this standard is inherently imprecise, it would add a significant element of uncertainty to the Board's determination of the scope of its discretion not to defer. Third, and most important, we see nothing in the statute or the Board's own decisions that excludes reliance, in deciding whether to defer, on factors besides the obviousness of the protected status of the employee's conduct. Enforcing the Act's protection may be important enough to outweigh the interest in encouraging arbitration, even in cases where the conduct involved was "arguably unprotected." The instant case, involving protection of a union official's freedom to prosecute grievances vigorously without retribution, is a case in which the Board could reasonably reach that conclusion.

evidence is that which a reasonable person could accept as a basis for reaching the same conclusion. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Board findings on issues of credibility will not be disturbed unless a clear preponderance of all the evidence convinces the court of appeals that the findings are incorrect. *NLRB v. International Longshoremen's Union & Local 27*, 514 F.2d 481, 483 (9th Cir. 1975).

A. The Offer of Economic Benefits.

Factor does not dispute that an employer violates Section 8(a)(1) by offering economic benefits in exchange for ceasing union activity. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944). It attacks the factual finding, affirmed by the Board, that Piercy and Bryant offered Gratz benefits if she would give up her job as chief steward. Conceding that this finding rests on the ALJ's acceptance of Gratz's testimony instead of the testimony of Piercy and Bryant, Factor argues that this acceptance was unreasonable and in conflict with the ALJ's conclusion, in two other instances of conflict between testimony of Gratz and Bryant, to accept Bryant's version. The ALJ's findings as to credibility are not self-contradictory, unreasonable, or contrary to the preponderance of the evidence. The Board's order finding of a violation of Section 8(a)(1) by unlawfully offering benefits must be enforced.

B. The Discipline and Discharge.

Substantial evidence in the record of proceedings before the ALJ supports the Board's finding that Factor disciplined and discharged Gratz because of her diligence and tenacity as a union advocate. This may be viewed as a "mixed motive" case, in which discipline was motivated by permissible as well as impermissible purposes. If so, the required finding that the forbidden motive "constituted the dominant and moving cause" of Gratz's discharge was expressly made and supported by substantial evidence. *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977); *Stephenson v. NLRB*, 614 F.2d 1210, 1213 (9th Cir. 1978).

Another, perhaps more accurate way of looking at this case is as one in which the employee committed arguable improprieties in the course of protected activities. Gratz's use of offensive and abusive language is typical of this line of cases. *See e.g., Hawaiian Hauling Service Ltd. v. NLRB, supra,* 545 F.2d at 676 n.8; *Dreis & Krump Mfg. Co. v. NLRB,* 544 F.2d 320, 328-29 (7th Cir. 1976); *Falcon Plastics—Division of B-D Laboratories, Inc. v. NLRB,* 397 F.2d 965 (9th Cir. 1968); *Boaz Spinning Co. v. NLRB,* 395 F.2d 512 (5th Cir. 1968). Her arguably excessive hours spent on union affairs, neglecting production work, can be analyzed in the same terms. The standard is whether her improper conduct was so indefensible as to forfeit the Act's protection. *See NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 17 (1962). Substantial evidence supports the conclusion that Gratz's conduct was not so flagrantly improper as to deprive her union activities of protection under Section 8(a)(1) and (3).

Finding no sufficient reason to set aside the Board's conclusions on the merits, we reach the question whether the Board's order of reinstatement was within its discretion. Factor argues that reinstatement is an inappropriate remedy and that the court may deny reinstatement, while enforcing the remainder of the Board's order. While we have the power to modify an order of the Board in an appropriate case, *see NLRB v. Western Clinical Laboratory, Inc.,* 571 F.2d 457 (9th Cir. 1978); *NLRB v. Apico Inns of California, Inc.,* 512 F.2d 1171 (9th Cir. 1975), the evidence of disharmony between Gratz and Factor's management does not justify overriding the Board's broad discretion to order reinstatement. *See Fibreboard Corp. v. NLRB,* 379 U.S. 203, 216 (1964).

Accordingly, we grant enforcement of the Board's Decision and Order.

PREGERSON, Circuit Judge (dissenting):

The Board's conclusion that deferral to the arbitration award would engender a result repugnant to the purposes and policies of the National Labor Relations Act is, as the majority opinion points out, unsupported by "analysis of the [Speilberg] repugnance criterion." I suggest that we need to know why the Board thought the arbitration award was repugnant to the Act before we determine whether the Board abused its discretion in refusing to defer to the arbitration award. Accordingly, I vote to remand with instructions that the Board state the reasons for its conclusions of repugnancy.

FILED

Sep 9 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

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OCT 24 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MAX FACTOR AND COMPANY,
Respondent,
and
LUISA GRATZ,
Intervenor.

No. 79-7118
ORDER

Before: GOODWIN and PREGERSON, Circuit Judges, and SCHWARZER,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing, and Judges Goodwin and Pregerson have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation

Voluntary Labor Arbitration

IN THE MATTER OF ARBITRATION between MAX FACTOR & CO., Employer and WAREHOUSE, PROCESSING & DISTRIBUTION WORKERS' UNION, LOCAL 26, ILWU, Union	**ARBITRATOR'S OPINION AND AWARD**

Grievance of Luisa Gratz

Arbitrator: Julius N. Draznin

Representing the Parties:

Union: Elizabeth B. Spector, Esq.
Margolis, McTernan, Scope & Sacks
3600 Wilshire Blvd., Ste. 2200
Los Angeles, California 90010

Employer: Ray W. Frederick, Esq.
Law offices of Sidney R. Korshak
69 West Washington St., Ste. 1717
Chicago, Illinois 60602

This arbitration was conducted at the Cockatoo Inn in Los Angeles, California, on the dates of September 19, 20 and 21, and November 2 and 3, 1977, in accordance with the terms of the contractual agreement binding the parties. All parties to this proceeding were afforded a full and adequate opportunity to present evidence, call witnesses who were duly sworn, and offer argument. The proceedings were electronically recorded. The parties filed timely briefs in conformity with their agreement.

THE ISSUE

The parties disagreed on the exact wording of the issue to be presented to this arbitrator. Accordingly, it is determined that the issue presented shall read as follows:

"Was the suspension of the Grievant, Luisa Gratz, on December 27, 1976, for just cause? If not, what should be the remedy?"

A second part of the issue shall read:

"Was the termination of Luisa Gratz, on February 3, 1977, for just cause? If not, what is the remedy?"

PERTINENT CONTRACT PROVISIONS

Section 2(F) [page 6]

F. Seniority will be broken by discharge for just cause, voluntary quitting or by twelve (12) consecutive months of unemployment, except in cases where extended leave of absence has been granted because of illness, injury or any reason agreeable to the Company and the Union.

An employee who is discharged or suspended will be given notice in writing thereof at the time of discharge or suspension with the reason or reasons for the discharge or suspension and a copy of the discharge or suspension notice sent to the Chief Steward and the Union. If the Union feels there was not justifiable cause for such action, the Union shall take the matter up as a written grievance beginning with Step Three of the grievance procedure within five (5) working days after the date appearing on the discharge or suspension notice.

Section 3 [page 7]

Section 3. Management Rights

The operation of the Company and the direction of the work force is vested in the Employer exclusively. This includes, but is not limited to: the right to hire and discharge, promote,

transfer, suspend, lay-off and establish work schedules; determination of type of products to be manufactured; the location of plants. In the exercise of the above management rights, the Employer agrees that any action taken by the Employer shall not conflict with any other provision of this Agreement. It is further provided that the provisions of the Section shall not be used by the Company for the purpose of discriminating against the Union or any of its members.

1st par., Section 4 [page 7]

Section 4. Shop Stewards

In all key departments, stewards shall be designated by the Union for the purpose of taking up grievances with management. It shall be the steward's responsibility to take up grievances promptly with the foreman, forelady or other immediate members of supervision, and if such grievances are not resolved they shall be processed in accordance with Section 18 of this Labor Agreement. No employee shall be denied the presence of a steward upon request. Stewards shall be accorded seniority above all others in their respective departments relative to lay-off only. The Chief Steward shall be permitted to visit any and all plant locations when the grievance procedure makes it necessary. There shall be no restrictions on the right of the Chief Steward to receive and return telephone calls from duly designated officers of the Local Union and the International Union.

Section 5 [page 8]

Section 5. Union Representatives

The authorized representatives of the Union shall be allowed to visit the Employer's plant or plants for the purpose of ascertaining whether or not this Agreement is being observed, to have access to the Bulletin Boards and the right to be present at any meeting between the Union and the Employer. If he wishes to interview an employee privately, he shall be permitted to do so by first contacting the Company representative at the plant. The Business Agent or Union Representatives shall not interfere with the normal work operations of the plant.

Section 8(A) [pp. 9 and 10]

Section 8. Minimums

A. Employees reporting to work and who do so at the regular time shall receive a minimum of four (4) hours' work, or if four (4) hours' work is not furnished, a minimum of four (4) hours' pay, unless such employees quit, voluntarily lay-off, or are discharged for just cause prior to the completion of four (4) hours' work. Employees having over thirty (30) days' seniority, if worked more than four (4) hours, shall receive a minimum of eight (8) hours' work or a minimum of eight (8) hours' pay in lieu thereof, except on Saturdays, Sundays and holidays. The above minimum hour requirements shall not apply if such employees quit, voluntarily lay-off or are discharged for cause.

Section 10 [page 10]

Section 10. Rest Periods

All employees shall receive two (2) rest periods per shift of twelve (12) minutes each in accordance with a schedule established by the Company; the first break period to occur approximately two (2) hours after the beginning of the shift, and the second break to occur approximately two (2) hours after the termination of the lunch period.

Section 13(B)(2) [pp. 12 and 13]

(2) Whenever an employee has been elected to an office of the Union requiring full time, not to exceed three employees, he shall be granted leave of absence for two (2) years, subject to renewal thereafter. Accumulative seniority shall cease after three (3) years, but said employee shall retain his past seniority. Three elected delegates to a Union convention or conference shall be allowed the time required to attend such Union convention or conference. Allowances shall be made to excuse employees who are required to conduct or participate in important Union business. The Union shall give the Employer at least forty-eight (48) hours notice if such absence is requested.

Section 18(A) and (B) [page 17]

Section 18. Grievance Committee and Arbitration

A. A Grievance Committee shall be established, consisting of six (6) members designated by the Union and any representative or representatives designated by the Company, not to exceed the number of Union representatives. In addition, the Union shall be represented by the Business Agent or other qualified representative of the Union, and the Company may be represented by one additional representative of management. Union members and management representatives who are involved in a grievance may also be called in, but such individuals will not be considered members of the Committee. The Grievance Committe shall meet once each week during regular work hours without loss of pay where grievances occur, except in the case of an emergency, when requested by Union.

B. It shall be the duty of the Grievance Committee to consider all matters referred to it by the parties. Every effort should be made by the Grievance Committee to arrive at a decision as expeditiously as possible.

Section 22 [page 19]

Section 22. Non-Discrimination

The Company agrees not to discriminate in any way whatsoever in employment transfers, promotions, lay-offs, rehiring or other conditions or work against any employee by reason of his sex, age, color, creed or origin or because of membership or lack of membership in a labor organization.

Section 26 [page 23]

Section 26. Purpose

The parties hereto, desiring to establish a harmonious relationship in order to stabilize and promote labor relationships, the orderly and equitable settlement of grievances and to prevent strikes and lockouts, do hereby agree that neither any member of supervision nor employee shall be permitted to harass, intimidate or coerce the other or to use profane or abusive language to the other.

DISCUSSION OF THE FACTS AND OPINION OF THE ARBITRATOR

The Employer is engaged in the business of manufacturing and distributing cosmetics and related products. In the operation of its business, the Company maintains manufacturing facilities in several cities including Los Angeles, California. Involved in this proceedings are the facilities in the Los Angeles area. The Employer has a bargaining relationship with the International Longshoreman and Warehouseman's Union, Local 26, for its employees in the production and maintenance units of its Los Angeles operations. The Union has been the bargaining agent for these employees for many years. There is at present in effect a collective bargaining agreement between the Union and the Employer, and there was an agreement in effect at the time of the suspension and discharge that were the cause of the Grievance that has led to this arbitration.

This dispute concerns the management's action in, first, suspending and then discharging the Union's Chief Steward, one Luisa Gratz. At the time of her discharge, she had been a company employee since March 13, 1968. She became Chief Steward for the Union in August 1974. Previous to holding that position she had served progressively as the steward in her department, as head department steward, and assistant Chief Steward. Her regular duties and job classification as a production employee when last employed by this Employer were that of a machine operator.

It is the position of the Union that the Employer suspended her without just cause and then, subsequently, fired her without just cause. They so contend and they presented extensive argument and many witnesses to support that position. In presenting its argument, the Union emphasizes that each of the several charges placed against the Grievant by the Employer related only to her conduct as a Chief Steward and not to her conduct as an employee of the Employer in the performance of such employee duties as were assigned to her.

The Union argues that the propriety of the suspension and of the discharge must be judged on the basis of the Grievant's special status as the Union's Chief Steward. If this is done, the Union argues, the Employer is resting its case on a series of events in which the Grievant was just carrying out her normal duties as Chief Steward and was doing nothing more than that, even under difficult conditions imposed by the management of Max Factor. Accordingly, the Union argues, the Grievant cannot be judged by this Arbitrator under standards that might be applicable to an ordinary employee.

In the brief filed by Counsel for the Union, it is argued that the Grievant "does not deny that she spent the major portion of her working hours carrying out her responsibilities as Chief Steward . . ." Also in the Union's brief, it is argued that the Grievant "does not deny that on December 27, 1976, she addressed an unflattering epithet to Bryant [a management official], and she does not deny that on February 2, 1977, she accused Bryant of lying." The brief of the Union also offers that it does not dispute the fact that the Grievant was the recipient of oral complaints "of the amount of time she spent on Union business," from William Piercy, Director of Industrial Relations for the Employer.

These and other arguments are offered by the Union in support of its position that what this Employer has done here is to effect the discharge of the primary Union activist because it wished to put a halt to that activity and for no other reason. The Union states that the special status of the Grievant entitles her to different and special considerations when it comes to the Employer effecting discipline, etcetera.

The Employer contends that, even though the Employee, Luisa Gratz, was the Chief Steward, they could not and will not condone her conduct and action as pursued in this instance. Accordingly, they first gave her oral warnings, then written warnings, which were subsequently discussed with her and higher ranking Union representatives. Then, with further serious infractions, they effected a three-day suspension; finally

they effected her discharge. The Employer offers that it has rules for employees to follow that are well-known by everyone who works for Max Factor, and they have a business to operate. This Employee, Luisa Gratz, was interfering with the operation of their business, was disrupting their labor relations, was insubordinate, was not doing her fair share of the work assigned to her, all in spite of repeated warnings, and finally was becoming so insubordinate and insulting in her conduct towards managements representatives that they had no recourse but to effect her dismissal.

The Employer pointed out that the Employee failed to heed the numerous warnings given to her with respect to her job responsibilities and to the abuse of her Union status and office; finally, she was given a letter of reprimand by the Employer on December 9, 1976. Although this reprimand was replied to by the Grievant, the Employer points out that no Grievance was filed by Gratz or the Union regarding the receipt of this reprimand. Subsequently, the Employer argues, because the Employee did not heed the December 9th reprimand, she was issued another written reprimand.

The Employer cites subsequent events that lead up to the discharge and justifies that action by citing the use of "profane, obscene, abusive, or threatening language," as defined in the Company rules. After her use of such language in talking to Mr. Bryant, a Company personnel official, Gratz was suspended for three days, on December 27, 1976. They argue that, since this was in actuality the second time the Grievant had used such language to Mr. Bryant, and because she had previously been warned that a recurrence would mean disciplinary action up to and including discharge; their action of a three-day suspension was in line with their progressive disciplinary approach to the handling of this problem.

The final event, according to the Company argument, took place when Gratz engaged in shouting at the Company's personnel chief that he was a "liar," and she repeated her accusations when warned by the Employer. Other terms,

considered by the Employer to fall within the scope of its rules prohibiting the use of profane, obscene, abusive or threatening language, were also used by Gratz against the Employer's representative, in the presence of other employees of the Employer. This final event took place on February 2, 1977, and, after due consultation with higher level officials and labor counsel for the Employer, the decision was made on February 3, 1977, to effect her discharge.

(It should be noted that the Union also filed unfair labor practice charges with the National Labor Relations Board regarding this situation. The present matter came before this Arbitrator after the Employer was directed by the United States District Court to enter into arbitration regarding this matter, which the Employer had at first refused to do while the NLRB case was still pending.)

The Plant Rules, a booklet introduced into evidence as Joint Exhibit #13, lists sixty-three (63) numbered paragraphs; these follow an introductory statement reciting the requirement for all employees to obey them and conduct themselves according to its tenets. Significant to this case are the following rules:

#19: "Employees shall not be insubordinate or refuse to follow management's or any agent of management's orders."

#23: "Employees shall not enter the plant or remain on Company premises unless working or immediately scheduled for work."

#37: "Employees shall not neglect their job, duties, and responsibilities, nor refuse to perform work assigned to them"

#39: "Employees shall not use profane or abusive language."

It is necessary, first, in this type of dispute, to examine the underlying facts that led to the final act of discharge. One principal area for consideration is whether or not there was disparate treatment of the Grievant, as against the other Union

stewards, for spending so much time away from the job. The Union called many witnesses to give their personal versions of how they functioned as shop stewards, even calling the current Chief Steward to tell how he functions in that post.

Throughout all of this testimony, it was abundantly clear that none of the stewards nor the current Chief Steward regarded themselves above Company rules and procedures, even when it came to doing their day-to-day Union functions under the contract. Although it was apparent that the Union was trying to show that the other stewards all functioned in a manner similar to that of the Grievant in their activities of assisting employees with their complaints, talking to supervision about someone's difficulties, writing up grievances when necessary, and being available to assist employees when requested by them to do so; the testimony of each such witness clearly showed that they *did* follow Company rules and they performed their assigned production work most of the time, doing Union work for the remainder.

It was also clear that the Union, in presenting this evidence, was attempting to show that the requirement placed by Mr. Piercy on Gratz, that she spend at least 50% of her time on the job doing the work assigned to her, was not a fair one, since the other Union employee representatives working for Max Factor were each spending large amounts of time doing Union business, acting no different than Gratz in how they worked. The evidence presented did not support that contention. With only one exception of the several witnesses presented by the Union was there any difference in the testimony to show that the stewards always checked with their own supervisors before leaving to go to another department regarding union business; they always checked into the new department they were visiting by first going to the supervisor in that department; they invariably were very considerate of the Company production; and they emphasized their concern to conduct their Union business with the least amount of interference and disruption.

This was even more clearly established by the testimony of the successor Chief Steward who is now conducting the Union's business while still putting in much more than 50% of his work schedule in his regular production capacity. This matter becomes very vital, because the Union contends that the Grievant was being unreasonably harassed by management on the issue of how much time she spent carrying out her responsibilities as Chief Steward. The Union contends that the amount of time she spent doing her job is a "phony issue" raised by management; the real issue behind it being the Company's efforts to limit the amount of time and effort she puts into doing her job as Chief Steward. The Union contends that the Company believed that Gratz was putting in an excessive amount of time into her Union work and they wanted that stopped; so they chose the route of action that they did.

In this area of consideration, the undersigned has carefully listened to the tapes of the testimony of the employees called by the Union, and has carefully examined the briefs and evidence offered. The undersigned concludes that the Employer was making an honest effort to secure at least 50% of the Grievant's time to be used as productive time for the Company and, in doing so, was being lenient with her as compared to the time put in by other Union representatives on the job. The others invariably testified to having worked much more than 50% of their time on assigned tasks. As pointed out above, even the new Chief Steward who has replaced the Grievant states that he is working very substantially more than 50% in his production capacity for the Employer. Thus, I am concluding here that there is very little, if any, evidence to support the Union's theory that the Grievant was being "picked on" by the Employer. Other Union steward were working under the same conditions, but had no apparent difficulty in performing both their assigned work functions, to the satisfaction of their superiors, and their duties as Union representatives on the job. Why was it so difficult for Gratz to do so?

The answer to this question may lie in other phenomena which clearly presented themselves in the course of these proceedings. The Employer contends that the Grievant held herself to be above all other persons on the job, to be equal to or above the management people she had to deal with. The Union cites cases where stewards are to be considered special people held not to have to approach the supervisor or foreman as an inferior or a subordinate, but as an equal; they contend therefore such representatives are not punishable by the same rules and regulations that apply to other working employees in the bargaining unit.

I have read the cases cited and cannot find any parallel to the facts in this case with those cited. In fact, I do note the following case citations which hold that Union stewards and Union officers *are not* specially exempt from adherence to Company rules and contract provisions. Insley Mfg. Corp. & Steelworkers Local 3215, Arbitrator Stouffer, 52 LA 950; Otis Elevator Co. & Automobile Workers, Local 451, Arbitrator Bradley, 54 LA 206; Haskell Manufacturing Co. & Intl. Union Electrical, Radio & Machine Workers, Arbitrator Florey, CCH vol. 66-1, 3665; I.T.&T. & Electrical Workers, Local 162, Arbitrator King, 54 LA 1110; National Radio Co. & I.U.E., Local 231, Arbitrator Cox, 60 LA 78.

Here we have the agreed-upon evidence of an employee telling, indeed at times shouting at, the Company official in the hearing and presence of numerous other employees, calling him a "phony," a "twerp," an "ass-kisser," a "racist," and a "liar"; and whether or not the others who heard and saw the incidents are all in the bargaining unit or were just waiting to be interviewed for a job is not of assistance to the Union's position here. All of these terms, and others, were used by this Grievant at one time or another in her efforts to show her alleged equality to management in representing her union.

This is not the test for showing equality at the work place. If it were the accepted norm, our industrial scene would soon be in complete and irrevocable shambles. Nor can I accept the

Union's proffered argumentation and citations to support their contention that the swearing admittedly engaged in by the Grievant here are really meaningless acts in the context of the give-and-take of labor relations.

In the facts in this case, we have the Grievant, on August 11, 1976, entering the outer office of Mr. Bryant, the Employer's director of personnel, and telling his assistant director, a Chuck Maxwell, that she wanted to see Bryant immediately. The assistant offered to be of any aid to her on her problem. She told the assistant that the matter concerned the employee Turner, and his bid on a plant utility job. Maxwell then told Gratz that he was the one who was handling the Turner matter and would be happy to talk to her about it. Whereupon the Grievant brushed aside the statement of the assistant personnel director Maxwell and asserted that, if Bryant did not come out of his office to see her within 15 minutes, she was going to barge right into Bryant's office herself.

In the course of these threats to Maxwell (who is a black man), she called Bryant a "racist pig." When Bryant did come out of his office, Gratz launched into her tirade at him and again, as she had previously, called Bryant a "racist pig," when Bryant was explaining to her the procedures the company was following regarding the Turner matter. Upon hearing Gratz call him this name, the official ordered her back to her work area and warned her. From all the testimony, the Grievant was very excited, yelling over and over to Mr. Bryant that he should fire her. Finally, after being told several times to leave and return to her job, she began to do so, stating as she left the office of Bryant, "I don't have to listen to your stupid remarks."

In addition to the office staff of six employees present when this took place, there were two black job applicants nearby completing job request forms who heard and saw the events that transpired.

I would not consider this as conduct incidental to the carrying out of the official duties of a Union representative. I certainly do not regard such statements in the context and

conditions shown here to be the type that falls within the concerted activities protected by law. Personal insults of the type related here, the context in which they were given, and the manner of their being hurled at the Employer are not to be condoned; and I do not condone them.

The incident of August, described above, led to a warning to Gratz and to a lengthy discussion with the Union's business representative, John Lee. It also led to a discussion of the Grievant's conduct with the Union's shop committee at which time they were told what had transpired, and also were told how the Company would react the next time such an event took place, including in their warning the possibility of discharge. During the talks with John Lee and at the Union meeting with management, according to the evidence presented, it is clear that (1) no one disputed what had happened on August 11th, and (2) management made it clear that disciplinary action, which might include discharge, would result the next time it happened.

On later dates the Grievant again asserted herself against Mr. Bryant and other Company officials, letting them know that she was the one who ran things there, that she could do what she wanted to when she wanted to, and, when they argued with her, that she had the right to tell them off in any language she saw fit. Presumably she secured the right to this course of conduct because she was the Chief Steward and, as the Union's representative, believed she had the right to conduct herself in this manner.

Here appears to lie the crux of the problem on this Employee's conduct. Gratz, from her testimony and demeanor on the witness stand, clearly showed that she really believes that she can say and do things other employees cannot say and do. Also, it was abundantly clear to this Arbitrator that the Grievant considers her conduct to be a normal one for someone in her post. I can find nothing in any decision in law nor of any adminstrative agency, wherein the facts in any way parallel those set forth here, that says an Employer was directed to condone what was said, how it was said, and who heard it said,

all because the Union steward said it. This was *not* a picket line situation; only in such conditions have the courts permitted a wide latitude in the use of the English language.

The animosity developed by Gratz on August 11 was founded, to begin with, upon incomplete and inaccurate information. It was then embellished by the fact that the Grievant has this notion that she is the same as the Director of Personnel. Therefore, in her mind very logically, she came to his office and would speak to no one else but him, not even his assistant who had been directed to handle the matter. Feeling secure enough in her position of equality to verbally assault the Director via his assistant, she then repeated the abusive conduct again to the Director when he saw her. Gratz's mental frame of mind at that time clearly illustrates the nature of her misconception. But she was still an employee of the Employer. If she chose to serve as the Union's Chief Steward, so be it. That did not confer upon her any sanctity or holiness of purpose, permitting the type of conduct she engaged in on that date.

During this period of time, Gratz was also being urged repeatedly by her superiors to give more time to her job with the Company. Unrebutted evidence introduced at the hearing clearly showed that the Grievant was putting in as little as 10%, or even less, of her time on the job in her job classification work. At least three oral warnings were given to Gratz by Mr. William Piercy, Director of Labor Relations for the Employer, previous to a formal written reprimand sent her on December 9, 1976. (Copies were also sent to other Union officials of the ILWU, including the Regional Director, the local Union president, and the business agent John Lee.) There was no question that the Employer intended for the memo sent to be a reprimand, and formal one at that. There is no other way to account for the events that took place then and following that date.

After reading the reprimand, the Grievant wrote a reply and sent copies to the same persons that Piercy has sent them too, plus some others. Then she chose to read the reprimand received and her reply at the Union's meeting.

In spite of this course of action, the Union and the Grievant argue before me that the reprimand of December 9th was, in truth, not a reprimand and not a formal document but really was nothing more than a personal letter from Piercy to Gratz; therefore, it should not count in the sequence of events that have transpired here. The Employer points out that the memo form chosen by Piercy was the result of his personal working relationship with her; but it was also an attempt to appeal to Gratz in the best way he knew to do in order to get her to change her ways, while at the same time making certain that the import of what he had written was not lost upon the Employee and the Union. She was in trouble with management, and he was trying to tell her so in no uncertain terms. But here we witness the Grievant choosing to disregard the message and contending that the December 9th epistle was, in reality, only a personal message, not to be regarded by her or by the Union as a "true" warning notice.

I cannot accept this line of thinking. The only reasonable conclusion one can reach from the examination of the testimony here is that the December 9th letter or memo was a "warning," in every sense of the term. It described a condition and suggested a remedy, "or else." The parties each handled the memo as a meaningful item and sent copies everywhere, discussing its contents among themselves and in joint sessions, as though it had meaning as a "warning." If, then, it was a warning, why was it not adhered to? Why was it of no effect?

The answer again must lie in the fact that this Grievant seemingly did regard herself as equal to, if not really better than, management people with whom she had to deal. Therefore, she could not accept the reality of what was happening. She was being given the consideration due her by having a "warning" come to her in the nature of a personally addressed note—but that did not detract from its meaning and importance regarding her continued employment with Max Factor. The fact that neither the Union nor the Employee chose to grieve the "warning" lends additional weight to the contention of the Employer that the Union and the Chief Steward recognized the truth of the document.

My conclusion regarding the December 9th "letter" or "memo" of "warning" to Gratz is that it must be considered in the context of the events preceding it and what took place after its receipt by the Grievant. These events include the repeated earlier discussions and counselling with Gratz by Mr. Piercy that she mend her ways and give the Company a fair share of her working day in the production duties assigned to her. She was obviously ignoring these directions, as witnessed by the evidence of her repeatedly spending each day and very frequently all day, the full 8-hour shift, on nothing but Union activity. Then came the "warning" item of December 9, which was treated as a serious enough document by everyone concerned, though in a final position, the Grievant decided that it wasn't anyone else's position; that it was only a private "letter" and not a "warning" within the meaning of that term and of the contract. The facts as described above clearly show otherwise. I find that the December 9th "warning" was just that under the contract and is hereby accorded full meaning and import for purposes of judging the events that followed and the course of progessive discipline that ensued.

On December 27th, 1976, several additional events took place which led to a three-day suspension effected by management against the Grievant. Again, these events appear closely related to the course of conduct being pursued by the Chief Steward in her relationship with the Employer. The evidence shows that the Grievant entered the offices of the Employer, stopped a clerk from the Personnel office, and insisted on receiving certain information from the Company, at once, regarding a disputed subcontracting matter. The Grievant was not happy with the answer from the clerk, which she considered evasive, because she then walked into Mr. Bryant's office and insisted on getting the required information from Bryant. Again she was told that the information would be secured for the Union but it was not possible to do so right at that time; when it was gathered, the information would be sent to the Union. Gratz took umbrage to this reply and begin to insist that she be given the information then and there. To this the

Company official replied that, after the information was gathered, it would have to be approved by the Company's labor law firm; the law firm would then mail it to the Union's attorneys. Bryant also told Gratz that she did not have the right to go about preparing her case against the Company that would go to arbitration while working on Company time. To this Gratz replied that she was going to go to the Company's Gardena plant to get the information herself and added, as she left Bryant, "I am not going to take any more of that crap from you."

A little later in that same morning of December 27, Bryant decided to issue another written reprimand to Gratz for her continued failure to perform a reasonable amount of work at her regular job for the Max Factor Company. The position of the Grievant, when she arrived at the offices of Bryant, was that as Chief Steward she was entitled to have *two* Union representatives present, not the single steward that the Company had already called to witness the issuance of the reprimand warning. Gratz was asked if she wanted to change the steward present for someone else, but she refused this offer; the steward present was one from her own work area in the packaging department of the Company. Also present was the assistant personnel director, Mr. Maxwell. Both Bryant and Maxwell credibly testified as to what transpired at the meeting. I accept their version of the conversation and the incident that developed.

What their testimony shows is that, when Gratz was asked by Bryant to sign, in order to acknowledge receipt of the second reprimand, she refused to sign the receipt proffered. She told Mr. Bryant that she, Gratz, was not going to let Bryant use her "to kiss Mr. Wurmbrand's ass." (Mr. Wurmbrand is the Company vice-president in charge of manufacturing.) Other vituperative and abusive language was used by Gratz in the exchange as it became more heated. Even the Union's witness to the event confirms the "ass-kissing" statement by Gratz. In addition, the credible witnesses cited above related how, as Gratz left Bryant's office, she continued to call him names, such

as "a big phoney" and "twerp." As these final remarks were being made as she left Bryant's office, we again have the working staff witness to and able to hear the language used against their boss by this employee.

Here the Union argues that such language is not so special and so bad that it merits any attention out of the ordinary. I do not agree. In this situation one does not have a supervisor from one department arguing with a steward from another department regarding the protection of someone's job rights, a situation where possible honest disagreement can arise. Rather, we have an employee who has apparently sincerely decided in her own mind that she is at least as good as, if not better than, the Company official she has to deal with; that she has as much right as he has to direct people around in the Company; that she can say and do what she pleases when she pleases. So she thinks nothing of using the most vile descriptions of relationships in order to make her point because, in her mind, she feels she is after all immune. The reference to the Company vice-president cannot be acceptable conduct at a discussion of a reprimand, or for that matter at any other level of a bargaining relationship, outside of a possible picket-line situation. Defamatory expressions like "phoney" may not be swearing in *fact,* but certainly they create a mental image on the person so castigated that makes it difficult to carry on a workable relationship. From the context in which Gratz used the terms here, it cannot be said that she was saying these words as idle remarks, as witness her fellow steward's testimony.

The steward states that he was so concerned after the argument was finished and Gratz abruptly walked away, that he first talked to Bryant for a moment or two and then went looking for Gratz. Why? Since he obviously was concerned for her, her remarks and conduct would have been the only basis for that concern. He obviously thought she had placed herself in some jeopardy by her statements. His conduct after the incident speaks for itself. Why go looking for her to calm her down if the steward had not himself perceived her conduct as treading in dangerous territory?

I consider this conduct as an adequate basis for Company disciplinary action. In many cases discipline has effectively been enforced and remained unrebutted by later decisions of arbitrators and the courts for far less than we have being accepted for the moment here. Clark Equipment Co. & Steelworkers, Arbitrator Kossoff, 61 LA 1301; Butler Stamping Co. & Shoe Workers, Arbitrator Pollock, 63 LA 765: Robintech Inc. & Machinists, Arbitrator Block, 65 LA 221.

This Employer was, according to the testimony of Company and Union officials, considering disciplinary action. They withheld same in order to give Gratz and the Union's higher officers a chance to discuss this situation and get her straightened out. Having a long bargaining relationship with this Union local, the Company agreed at previous events to let the Union's higher office personnel handle the matter of Gratz's conduct and so did not immediately effect disciplinary sanctions against Gratz. In view of the desire to improve the bargaining relationship on the part of both sides, at the top at least, I can accept the Company's neglect to act at the earlier events that transpired. Finally, however, the Company had to act—and did.

At about four p.m. that same day, December 27th, the Union's business agent, the Chief Steward and the steward from the packaging department, Mr. Daly, were all asked to come to the offices of Mr. Bryant, in Personnel. Daly testified regarding this meeting that he told the Union's business agent, Mr. Lee, that he thought Gratz was going to get a suspension. Since he was not asked why he thought so, I must presume that he decided the Company would do this because of his own assessment of the conduct of Gratz earlier that day.

At this meeting Gratz was given a three-day disciplinary suspension because of her use of abusive language, that being the second such occurrence after she had been warned that a recurrence would mean disciplinary action by the Employer. Mr. Lee was contacted from Bryant's office during this meeting. As Gratz and Lee spoke on the "squawk box" phone hook-up,

Gratz told Lee she would take the suspension and talk to Mr. Piercy later on, and then file her Grievance. This Grievance is one of the two issues before this Arbitrator.

Through an overwhelming amount of credible evidence, the incidents and events clearly establish that the Chief Steward, Luisa Gratz, merited the disciplinary sanction of a three-day suspension levied against her. The Company did not act incorrectly or unjustly in effecting that discipline under the terms of the collective bargaining agreement.

The next item in this sequence of events involves the incident of February 2, 1977, which led to management's decision to discharge the Employee. On February 1, Gratz had gone to the Company warehouse to talk to two of the Union's stewards regarding some pending grievances. The Company contends she was there for two hours, interrupting the flow of work and interfering with operations by her conduct.

They also contend that the Chief Steward should speak to such personnel only when a supervisor is present on the scene, as should any steward. Gratz objected to this limitation and reached Mr. Bryant on the phone, who confirmed this procedure. She objected and called the Union's business agent, Mr. Lee. Further calls were made; this resulted in the involvement of Mr. Piercy as well. Finally, Bryant gave Gratz the word that she could have ten minutes more with the stewards. She was told that this edict came from Mr. Piercy who said she could take it or leave it. Gratz refused the offer. She called Mr. Lee that night at home and arranged for them to meet at the Company offices the next morning regarding this matter. (It should be noted here that the work-log of time spent kept by the Grievant showed her to be on the warehouse premises in the conduct of this Union business from 10:15 a.m. to 11:00 a.m. The Company log showed her to be there from 10:00 a.m. to 12:00 a.m.)

Before the following morning meeting, however, Gratz became involved in another event regarding the use of the Company facilities for holding a Union meeting. The Chief

Steward stayed at the Max Factor factory after finishing work at 4:30 p.m. to wait for a meeting with other stewards. She soon had several employees with her at a table in the plant cafeteria. This was noted at about 5:25 p.m. by Mr. Bryant as he passed through the area; and he decided to check to see if these employees had left their jobs with permission of their supervisors. A check showed that permission had been granted by these employees' supervisors to go to the cafeteria after they had punched in for their night-shift duties, for the purposes of a Union meeting.

Gratz contends that the get-together was not a union meeting but just a fortuitous event, only the gathering of some passing personnel, and that it lasted only twenty or thirty minutes. The evidence offered by the Employer would effectively contradict this submission by Gratz. Besides Bryant's noting the time of his observation and reminding himself at the time to check on the permission aspects of what he observed, there are also the statements and testimony of the employees as to why they went there. If Gratz was there with her group for only twenty to thirty minutes, she could not have been seen at 5:25 p.m. by Bryant, since Gratz herself claims she got there at about 4:30 p.m. This incident becomes important as a basis for understanding the remarks and interchange of words the next day. For what happened in the two events on February 1st becomes the reference for the exchanges on February 2, leading to the discharge action.

On the morning of February 2nd, Bryant awaited Gratz at her clock in her area. He asked her to meet with him. She requested the opportunity to clock in first, which Bryant agreed to. Then Bryant waited for her to return, but she did not. After some ten minutes, Bryant went to Gratz's work area and, with the aid of her supervisor, located her. She was talking with business agent John Lee and a steward, in the hallway area. Bryant explained to Lee and Gratz that the Chief Steward needed specific Company approval to investigate grievances in the manner in which she was carrying on, although as Chief Steward she had the right, of course, to participate in every step

of the grievance procedure. He explained that the Company felt she was abusing the privilege by her conduct of investigating grievances on Company time and in the matter in which she operated. Bryant followed this with a recapitulation of the conversation and events of the previous day.

Gratz said she could not accept any restrictions and told everyone present that the contract gave her all the time she needed. Then, as Bryant's explanation to Mr. Lee continued, Gratz interjected, shouting at Bryant, "You're a liar." Bryant responded, "I'm not going to take any more of that from you." To which Gratz again challenged him by shouting, "You are a liar." Bryant then cautioned her that, if she said this to him once more, she would be suspended. Again Gratz hurled the imprecation at the Personnel Director. Whereupon he told her to come to his office with him.

Luisa refused to go, responding that he should say "please" to her, that she was "not his dog." Bryant said "please." Another employee, a steward named Williams, who claims to have happened by and observed and heard the events, agrees that Bryant asked Gratz in a polite way to come to him; he observed that she continued to shout at Bryant even though he, Williams, urged her to respond affirmatively. Finally Gratz did go to Bryant and the official then asked her about the meeting she was holding the previous evening. Williams, apparently deciding that nothing good would come of Gratz's talking any more with Bryant then and there, told her to immediately leave the area and go back to work, thus terminating the conversation before Gratz could reply.

Following this incident, Company officials Bryant and Piercy discussed the problem of the Chief Steward. They examined her record and decided that she should be terminated. They contacted their labor law counsel and discussed the matter with them; counsel agreed with the decision to dismiss the employee. On the next day, February 3rd, because Gratz was absent from work, they sent a telegram to her at home and also gave a copy of the termination notice to Dave Valle, who was then serving as acting Chief Steward in Gratz's absence.

The Union argues that the term "liar" is not profanity and not abusive. I disagree. A term's relative strengths and weaknesses are frequently related to the context in which it is used and the way in which it is meant. To argue that someone is a liar is at any time a severe challenge, at least, to the person so accused. But to hurl such a term, not only as a challenge but also as a demeaning and degrading epithet, as was clearly intended here by the Employee in the presence of other employees, cannot be relegated to the status of meaningless shop banter.

The Union cites instances where the language of the shop, indeed the shop of this Employer, has possibly included the use of swear words by supervisors and others. Showing that nothing was done about that then, they ask, therefore: why is Gratz's conduct considered so bad?

The answer here again must lie in the circumstances, the particular context of the events in which she was involved and the manner and intent of her remarks in order to decide their value and weight. From my consideration of all the evidence and testimony presented here, and from an examination of the citations offered, I must conclude that Gratz's conduct went far beyond any permissible bounds that might be considered to exist in the normal bargaining relationship. This Employee was hurling a challenge to the whole of the Employer by her conduct, and her words cannot be separated from her clear intent.

There can be only one management and, unless otherwise stipulated by contractual language, that does not include the Union's stewards or its Chief Steward. This contract does not give the Chief Steward the authority to direct or interfere with the Company operations. This contract does not place this Employee above the language of the agreement just because she happens to be the Chief Steward.

No other Chief Steward before her nor since has had the problems she has had. Is this because they were not doing their jobs adequately or properly? The evidence does not support

such a theory nor contention that the other stewards are or have been malfunctioning. By his own testimony, the present Chief Steward has shown he has given a substantial majority of his work time to the assigned job he holds and still has been able to do the job of the Chief Steward to everyone's satisfaction. The present Chief Steward, William Bouldin, who has been an employee of the Company since 1968, avers that he knew of the efforts of the previous Company labor relations head, a Mr. Wooten, to keep a record of and watch the use and possible abuse of Company work-time by stewards. Such records have been kept by the Company before, and the Union's contention that, by maintaining records on Luisa Gratz, the Company was subjecting her to possible disparate treatment, must fall. The evidence does not support that argument.

Finally, the authority of management to manage is vital to its existence and to the successful operation of its business. Management must be able to meet any challenge to this authority in a matter that both resolves the issue and also permits it to retain the essential dignity it needs to command the respect and cooperation of those who works for it and to produce a competitive product. In my opinion, this Company had exercised great circumspection and forbearance. They first cautioned the Grievant, counselled and cautioned again. Then as events developed, warnings were given and then a suspension was meted out: all in a careful and progressive fashion. Finally, in spite of obvious cautions from her own Union leadership and from management itself, this Employee created the condition that caused her separation by management.

No Employer could long survive in our industrial milieu if it were to permit the operation of a different standard for application of its rules for each level of the Union's echelons in the plant, and for different employee groups. The Union does not deny that the Employer is entitled to a decent return in productivity for its payment of wages to its employees. The Union does not deny that this Grievant acted in a manner that

was different from and more aggresive than any other such employee of the Employer. The Union argues that a Chief Steward is different and gains special status to violate Company rules. I do not accept this statement.

There is nothing I know of or present here, nor is there any agreement or language herein, that lends itself to any such interpretation. Nor does the evidence here in any way support any possible theory or contention that the Employer acted on the basis of anti-union animus in effecting the suspension or discharge. See Coca Cola Co. & Farm Workers, Arbitrator Crane, 65 LA 221.

Further, in the Haskell case cited earlier in this decision, the Arbitrator found that disciplinary action taken against the Union's steward was proper in a situation where the steward directly challenged a fair and equitable direction from an officer of the Company in front of other employees. Also, as in the Robintech case previously cited, the discharge of a steward was proper where direct orders of a supervisor were disobeyed and the steward challenged the supervisor, using obscene language, when served with a warning letter. These decisions, among many others, indicate that plant rules and contract language apply to all employees of an Employer, including Union stewards.

The Chief Steward of course has more leeway to participate in the grievance process begun by employees with their stewards and supervision, but has no other license other than that set forth in the instruments in effect between these parties.

In summary, in view of the very extensive nature of the evidence presented and the testimony and argument offered, I must and do conclude that the suspension of Luisa Gratz for three days in December, 1976, was proper, and the discharge of Luisa Gratz on February 3, 1977, was also proper. Both actions taken by the Employer were in these circumstances for just cause.

AWARD

The Grievances filed herein are dismissed.

SIGNED: JULIUS N. DRAZNIN

Julius N. Draznin
Arbitrator

Dated: January 3, 1978
Los Angeles, California